91-1626

No. ____-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEVEDORING SERVICES OF AMERICA, INC.,
formerly Seattle Stevedore Company,
a California Corporation,

Petitioner,

vs.

EDWARD M. EGGERT; JODI EGGERT, his wife;
and the marital community composed thereof.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an employer compelled to pay benefits under the Longshore and Harbor Workers' Compensation Act is entitled to repayment of overpayments if it is successful on appeal.

2. Whether a claimant who obtains compensation benefits under the Longshore and Harbor Workers' Compensation Act through misrepresentation or fraud is entitled to keep payments wrongfully received.

3. Whether a claim for repayment of compensation wrongly paid under the Longshore and Harbor Workers' Compensation Act "arises under" that Act, so that federal subject matter jurisdiction exists.

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EDWARD M. EGGERT; JODI EGGERT, his wife;
and the marital community composed thereof.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This petition arises out of the Ninth Circuit's reversal of a District Court judgment ordering Edward M. Eggert to repay compensation he had wrongfully received under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, *et seq.* The petition is filed on behalf of Stevedoring Services of America, Inc. ("Stevedoring")[1].

OPINIONS BELOW

The Administrative Law Judge's unpublished "Decision and Order on Remand," which finally determined Mr. Eggert's right to compensation under the LHWCA, appears in Appendix D, pages 29a-46a. The District Court's "Order Granting Summary Judgment for Plaintiff," ordering Mr. Eggert to repay compensation he received but to which he was not entitled, was published at 23 Ben. Rev. Bd. Serv. 25 (CRT), and appears in Appendix B, pages 15a-24a. The District Court's "Judgment on Order Granting Summary Judgment for Plaintiff" appears in Appendix C, pages 25a-28a. The Ninth Circuit's opinion reversing the District Court, *Stevedoring Services of America, Inc. v. Eggert,* 953 F.2d 552 (9th Cir. 1992), appears in Appendix A, pages 1a-14a.

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was filed January 9, 1992. No motion for rehearing was made. Pursuant to

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[1]Stevedoring Services of America, Inc., a California corporation, is the successor of Seattle Stevedore Co., formerly a Washington corporation. Stevedoring Services of America, Inc. is a subsidiary of FRS Capital Corp., a Washington corporation. Stevedoring Services of America, Inc. has no non-wholly owned subsidiaries.

28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1, the petition for writ of certiorari is timely filed, having been filed within 90 days of the entry of the opinion of the Ninth Circuit. Jurisdiction is conferred on this court by 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The following relevant provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, are set forth in Appendix E, pages 47a-63a: 33 U.S.C. §§ 905(a); 908(j); 914; 916; 921; 922; 927; and 931.

STATEMENT OF THE CASE

A. Background Facts Regarding Circumstances of Overpayment of Compensation Under LHWCA.

Edward Eggert filed a claim under the LHWCA, alleging he had slipped on ice during the course of his employment as a longshoreman with Stevedoring Services of America Inc. ("Stevedoring"). Stevedoring initially voluntarily paid compensation, and then contested any further payment. After a hearing in April 1981, before a United States Department of Labor Administrative Law Judge ("ALJ"), Stevedoring was ordered to pay past and continuing compensation to Mr. Eggert at the rate of $380.78 per week.[2] Mr. Eggert had misrepresented facts and lied to obtain that com-

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[2]By July 1986, the payments totalled more than $100,000.

pensation award.

Stevedoring appealed the compensation award. Under existing law, Stevedoring could not obtain a stay of payments pending appeal. The ALJ order was ultimately vacated by the Benefits Review Board in July of 1985.

After the Benefits Review Board vacated the initial compensation order, new hearings were held before the ALJ. At the final hearing in July of 1986, Mr. Eggert's pattern of falsehoods to receive unmerited compensation came to light.[3] As the District Court stated:

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[3]The ALJ gave numerous examples of Mr. Eggert's lies and misrepresentations:

> At the July, 1986 hearing, it became apparent that claimant has absolutely no credibility. For example, although claimant had indicated at the original hearing that in December, 1980 he had had no income and was living on food stamps, during that same month he deposited over $8,000 in his bank account . . . . Although at the 1983 hearing claimant had testified that he had not done any contracting for 3-1/2 years, in March of 1983 he was doing a contracting job for his attorney (at that time) for $28,500 . . . . Claimant admitted to having lied on the witness stand before Judge Halpern. . . .

Appendix D, at 32a-33a (citations to record omitted).

> [S]urveillance films taken in July 1981 and May 1986 show claimant performing heavy physical labor without difficulty, at the same time that claimant was alleging he continues to be totally disabled from longshore work . . . . Claimant also

> Based upon the evidence at the final hearing, held in July of 1986, the ALJ found that Eggert had fraudulently obtained his benefits. He found Eggert had lied repeatedly about whether he was receiving income other than his benefits, making false statements under oath both on written forms and in his testimony at various hearings.

Appendix B, at 16a.

The ALJ found a small portion of Mr. Eggert's claim to be valid, and awarded temporary disability benefits from January 26, 1980 through April 15, 1980, which totalled $4,351.77. Appendix D, at 45a. The ALJ further ordered: "Credit is to be given for all sums paid to date." *Id.*[4] The ALJ also ordered Mr. Eggert to pay $60 in attorney fees in connection with a motion to compel discovery.

As of the date of the Decision and Order on Remand, Stevedoring had paid $101,003.32 in compensation to Mr. Eggert for his alleged total disability. Subtracting the amount the ALJ found legitimately due to Mr. Eggert, Mr. Eggert had been overpaid $96,651.55 in temporary total disability compensation, not including

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> failed to disclose his income (in excess of $80,000 [for only a six-month period]) from his contracting business . . . .

Appendix D, at 44a (citations to record omitted).

[4]The "sums paid to date" totalled $101,003.32.

interest.

B. Procedural Background.

Stevedoring filed suit against Mr. Eggert in the United States District Court for the Western District of Washington on February 10, 1989, seeking repayment of the nearly $100,000 in overcompensation it had paid Mr. Eggert, as well as payment of the $60 sanction ordered by the ALJ. The legal theories for recovering overcompensation included a remedy implied by the LHWCA when an award of compensation is reversed and vacated on appeal, and pendent state claims for unjust enrichment, conversion, and fraud. No answer was filed.

The parties cross-moved for summary judgment. Stevedoring presented evidence of the amount overpaid to Mr. Eggert and evidence of Mr. Eggert's pattern of fraud, which enabled him to obtain compensation to which he was not entitled. Mr. Eggert presented no evidence and admitted he had been overcompensated. He instead argued defenses of exhaustion of administrative remedies and primary jurisdiction.

The District Court found that federal question jurisdiction existed pursuant to 28 U.S.C. § 1331, concluding the action was fundamentally one to enforce an administrative order under the LHWCA. The District Court entered an order granting Stevedoring's motion for partial summary judgment, finding that an implied right of repayment is necessary in order to make the employer's appeal rights under the LHWCA meaningful. According to the District Court, to deny the relief requested

> would emasculate Stevedore's appeal rights, and provide Eggert an unconscionable windfall. This could not have been [the] intent of [Congress].

Appendix B, at 19a.

The District Court rejected Mr. Eggert's defenses, noting that no further administrative remedies were available, and finding: "[T]here is a final administrative determination that there has been an overpayment; and there is no dispute as to the amount. All that remains is enforcement of Stevedore's right to receive it." Appendix B, at 18a.

Mr. Eggert appealed to the Ninth Circuit, arguing that Stevedoring had failed to exhaust administrative remedies. The Ninth Circuit reversed the District Court order with respect to repayment of overcompensation, finding the District Court lacked federal subject matter jurisdiction. It held that provisions in the LHWCA entitling employers to recoup overpayment from future compensation payments due were the exclusive remedies intended by Congress when an employer successfully appeals a compensation award. The Ninth Circuit inferred that, when no future compensation payments are due, Congress intended to allow the claimant to keep overpayments of compensation, whether procured by fraud or otherwise.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Rejection of Employers' Rights to Recoupment Under the LHWCA Raises an Important Question of Federal Law.

1. Introduction.

Congress gave employers the right to appeal awards of compensation under the LHWCA. 33 U.S.C. § 921. Until the Ninth Circuit's decision, courts have assumed that the appeal rights created by Congress give employers who are successful on appeal the right to repayment of compensation not owed.[5] Indeed, the courts have relied upon the implied right to recoupment in holding provisions of the LHWCA constitutional which deny the employer the right to a stay pending an appeal.

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[5] In *Ceres Gulf v. Cooper*, No. 91-2097, 1992 WL 58303 (5th Cir. March 27, 1992), the Fifth Circuit recently reached the same conclusion as the Ninth Circuit, reversing a judgment for the employer and insurer. Counsel has been advised that the employer and insurer in the *Ceres Gulf* case intend to file a petition for rehearing, and if that petition is denied, to petition this Court for a writ of certiorari. The employer's right to recoupment is also currently being considered by the Alabama Supreme Court in *Holcombe v. Alabama Dry Dock & Shipbuilding Corp.*, No. 1901992 (Ala.). Counsel has been advised that that case will also involve a petition for certiorari to this Court if the Alabama Supreme Court reverses the judgment for the employer. Although the circumstances leading to overpayment differ in these three cases, the issues are similar and the cases should probably be consolidated if writs of certiorari are granted.

The Ninth Circuit's decision that an employer is entitled to repayment only when the claimant is entitled to future compensation negates meaningful appeal rights for employers who are often compelled to pay the entire award prior to a decision on appeal.[6] The Ninth Circuit's ruling also provides a windfall to fraudulent claimants who are ultimately determined not to be entitled to any compensation. Under the Ninth Circuit's decision, disabled workers who are entitled to future compensation must repay past overpayments; claimants who procure compensation benefits through fraud need not repay, because no future compensation would be due. Further, the Ninth Circuit's decision undermines fundamental policies of the LHWCA by discouraging voluntary payments of compensation to injured workers because employers who make voluntary payments risk forfeiture of payments made in excess of statutory entitlement.

Finally, this case raises important constitutional issues. If an employer appealing an award is denied a stay pending appeal, is not afforded a right to expedited review,[7] and as the Ninth Circuit holds, is also denied recoupment if it is successful on appeal, then the employer's constitutional due process rights under the Fifth Amendment would be violated.

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[6]Compensation under the LHWCA must be paid within 10 days following an award. 33 U.S.C. § 914(f). In cases involving scheduled awards (impairment to arms, legs, hearing, vision, disfigurement), compensation is paid in a lump sum. 33 U.S.C. § 908(c)(1)-(20).

[7]An appeal to the Benefits Review Board, as was the case here, typically takes several years.

For all these reasons, this petition raises important questions of federal law which should be settled by this Court. Sup. Ct. R. 10.1(c).

2. The Ninth Circuit's Decision is Contrary to the Clear Intent of Congress to Afford Meaningful Appeals Under the LHWCA.

Congress provided persons adversely affected by the issuance of compensation orders under the LHWCA a right to appeal. Presumptively, Congress intended such appeal rights to be effective and meaningful.

Congress, however, did not allow stays of payments pending appeal of awards under the LHWCA "unless irreparable injury would otherwise ensue to the employer or carrier." 33 U.S.C. § 921(b)(3). Federal circuits have adopted the following definition of "irreparable injury":

> [I]rreparable injury is demonstrated only when the compensation award may be too heavy for the employer or insurer to pay without practically taking all his property or rendering him incapable of carrying on his business, or by reason of age, sickness or other circumstance of the payer, a condition is created which would amount to irreparable injury.

Edwards v. Director, OWCP, 932 F.2d 1325, 1329 (9th Cir. 1991) (quoting *Rivere v. Offshore Painting Contractors,* 872 F.2d 1187, 1191 (5th Cir. 1989)). Thus, it is impossible for solvent employers to obtain stays of

awards pending appeal.

Because a solvent employer cannot obtain a stay of an award pending appeal, the employer's appeal rights are rendered meaningless if, after an award is reversed and vacated, as the Ninth Circuit holds, the unworthy claimant could keep the award. Congress must have intended a right to repayment of awards wrongfully obtained, as that is the general rule when any judgment or order is reversed or vacated. As this Court has stated:

> Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error.

Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301, 309 (1935). The general rule should apply in this case, where there is no express congressional intent to the contrary. As this Court stated:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986).

Federal courts and the Benefits Review Board have assumed since the early years of the LHWCA that the employer may obtain repayment of overcompensation from the claimant if an award is vacated or reversed on appeal. *See, e.g., Rivere v. Offshore Painting Contractors,* 872 F.2d 1187, 1192 (5th Cir. 1989). As the Benefits Review Board reasoned in *Grumbley v. Eastern Associated Terminals Co.,* 9 Ben. Rev. Bd. Serv. 650, 652-53 (1979):

> The Act provides no procedure by which an employer can recoup payments should an award be reversed on appeal. *Employer argues that the failure to provide such procedure violates employer's right to due process. However, this argument ignores employer's access to relief by means of a civil action for recoupment of payments made if he is ultimately found not liable.* This same relief is available if employer is found liable for a penalty under [33 U.S.C. § 914(f)].[8] [Emphasis added.]

The Ninth Circuit's denial of the right to recoupment would make the LHWCA unconstitutional. Where, as here, a right to appeal is provided, due process requires that the appeal be effective. *See Evitts v. Lucey,* 469 U.S. 387, 393 (1985); U.S. Const. amend. V. Under the Ninth Circuit's decision, the employer's LHWCA appeal rights are rendered meaningless and

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[8]The forum for obtaining such relief is federal district court. *Providence Washington Ins. Co. v. Director, OWCP,* 765 F.2d 1381, 1384 (9th Cir. 1985).

ineffective, because a solvent employer has no effective pre-deprivation remedy of either a stay pending appeal, or an expedited appeal, and now has no post-deprivation remedy of recoupment.[9]

Until the Ninth Circuit's opinion in this case, courts and Congress have acknowledged only a single impediment to recoupment of overcompensation under the LHWCA: the claimant may be financially unable to repay money received but to which he or she was not entitled.[10] The courts' and Benefits Review Board's

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[9]Indeed, if repayment is not possible, then appeals by employers who have paid all compensation ordered would become moot before they are resolved. Courts would lack jurisdiction under Article III of the United States Constitution to entertain those appeals, as they would not be able to affect the rights of the litigants. *See, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S. Ct. 1249, 1253 (1990); *Population Inst. v. McPherson*, 797 F.2d 1062, 1081 (D.C. Cir. 1986) (if funds are distributed and unrecoverable, appeal will become moot).

[10]Courts in the following cases found that, although the financial condition of claimants will likely prevent employers from being able to recoup overcompensation, there is no "irreparable injury" under 33 U.S.C. § 921(b). The constant reference to the claimant's financial condition as the sole bar to recoupment indicates that, contrary to the Ninth Circuit's opinion, it has been assumed for 60 years that the employer is entitled to seek repayment of overcompensation. *See Associated Indem. Corp. v. Shea*, 325 F. Supp. 1100 (S.D. Ala. 1971), *aff'd*, 455 F.2d 913 (1972); *Holland Am. Ins. Co. v. Rogers*, 308 F. Supp. 1031 (N.D. Cal. 1970); *Travelers Ins. Co. v. Belair*, 284 F. Supp. 168 (D. Mass. 1968); *Higgins, Inc. v. Donovan*, 249 F. Supp. 941 (E.D. La. 1966), *aff'd*, 373 F.2d 18 (1967); *Alabama Dry Dock & Shipbuilding Co. v. Henderson*, 98 F. Supp. 1001 (S.D. Ala. 1951); *Seas Shipping Co. v. Cardillo*, 86

interpretation of the LHWCA as requiring repayment of overcompensation, unless the claimant has spent it and is insolvent, was made explicit in Congress at the hearings in 1981 on a bill to modify the stay provisions of 33 U.S.C. § 921:

> Currently, there is, of course, a real problem if a claimant spends his back benefits while the case is on appeal. The employer may be unable to recoup these benefits if the award is eventually overturned.

LHWCA Amendments of 1981: Hearings Before the Subcomm. on Labor of the Sen. Comm. on Labor & Human Resources, 97th Cong., 1st Sess. 205 (1981). (Prepared statement of Chief Administrative Appeals Judge Samuel J. Smith.) Congress declined to grant employers the right to a stay pending appeal because it understood that only the insolvency of a claimant would impede recoupment of overcompensation.

The Ninth Circuit's inference that Congress did not intend to allow recoupment of overcompensation is not supported by legislative history. On the contrary, the Ninth Circuit's decision directly conflicts with the

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F. Supp. 531 (E.D. N.Y. 1949); *Pioneer Eng'g Co. v. Cardillo,* 68 F. Supp. 743 (E.D. Pa. 1946); *American Shipbuilding Co. v. McManigal,* 65 F. Supp. 297 (W.D. N.Y. 1946); *Lehigh Valley R. Co. v. Lowe,* 68 F. Supp. 753 (D. N.J. 1946); *Tucker v. Norton,* 47 F. Supp. 762 (E.D. Pa. 1942), *aff'd,* 134 F.2d 172 (3rd Cir. 1943) (adopting opinion of district court); *Travelers Ins. Co. v. Norton,* 32 F. Supp. 501, 502 (E.D. Pa. 1940); *Luckenbach S.S. Co. v. Norton,* 21 F. Supp. 707 (E.D. Pa. 1937); *Continental Casualty Co. v. Lawson,* 2 F. Supp. 459 (S.D. Fla. 1932), *reversed,* 64 F.2d 802 (5th Cir. 1933), *cited with approval in Rivere,* 872 F.2d at 1191.

expressed congressional intent. If, as the Ninth Circuit holds, a claimant is not required to repay an award when the employer prevails on appeal, an employer will be able to establish "irreparable injury" from any denial of a stay. "[I]rreparable injury occurs only when post-deprivation remedies will be inadequate to make the aggrieved party whole." *Abbott v. Louisiana Ins. Guar. Ass'n,* 889 F.2d 626, 631 (5th Cir. 1989), *cert. denied,* 494 U.S. 1082 (1990).

In other contexts, courts have recognized that, if a party is required to make a payment prior to resolution of a case, "irreparable harm" will occur only if the payment cannot be recovered after a determination it was not owed. *I.A.M. Nat'l Pension Fund v. Cooper Indus., Inc.,* 789 F.2d 21, 25 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 971 (1986) (no irreparable harm from denial of interlocutory appeal of order to make immediate payment, as "[a]dequate safeguards exist to insure that Cooper will promptly recover any overpayment in a lump sum with interest"); *Rosenfeld v. United States,* 859 F.2d 717, 721 (9th Cir. 1988) (no irreparable harm if erroneously awarded interim fees can be recouped); *National Org. for the Reform of Marijuana Laws v. Mullen,* 828 F.2d 536, 542 n.2 (9th Cir. 1987) ("no prospect of irreparable harm from payment of . . . fees . . . because the money paid can be recouped"). Unless the Ninth Circuit is reversed, the reasoning of those cases will be equally applicable to LHWCA cases, requiring the Benefits Review Board to grant a stay under 33 U.S.C. § 921(b)(3) every time an employer appeals a compensation award and asserts no future compensation will be due.

3. It Is Proper for Courts to Imply Remedies to Effect the Expressed Intent of Congress Under the LHWCA.

Although Congress surely intended that the appeal rights it created would have meaning, Congress did not provide express procedures in the Act for repayment of compensation wrongfully obtained. Accordingly, the District Court implied judicial procedures to enforce repayment.

This Court recently reconfirmed that when Congress creates a statutory right, courts should imply all necessary and appropriate remedies to implement that right. *Franklin v. Gwinnett County Pub. Sch.,* 112 S. Ct. 1028, 60 U.S.L.W. 4167, 4170 (1992). Further, this Court also recently acknowledged that the LHWCA is not so comprehensive as to preclude remedies other than those expressly stated in the Act.

> The administrative proceedings outlined under the LHWCA in no way approach 'the [National Labor Relations Act]'s "complex and interrelated federal scheme of law, remedy, and administration"' requiring pre-emption in those cases.

Southwest Marine, Inc. v. Gizoni, 112 S. Ct. 486, 493 (1991).

Federal courts have frequently filled "gaps" in the LHWCA in order to give effect to rights created by Congress. The following cases represent instances where courts have implied remedies under the LHWCA:

Phillips v. Marine Concrete Structures, Inc., 877 F.2d 1231 (5th Cir. 1989), *on rehearing*, 895 F.2d 1033 (1990) (implying right of employer to recoup overcompensation paid to claimant from moneys due to claimant from special fund); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 1384 (9th Cir. 1985) (implying procedure for speedy enforcement of 33 U.S.C. § 914(f) penalty order); *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52, 55 (3rd Cir. 1978) (implying right of insurer to intervene in LHWCA proceedings to recoup improperly paid benefits, although "Act does not explicitly provide procedures for intervention"); *Allen v. Texaco, Inc.*, 510 F.2d 977, 979 (5th Cir. 1975) ("The subrogation right where there is no award is a judicial creature with the statute as a rationale."); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972) (allowing award of interest on unpaid installments of compensation despite lack of express authority therefor); *Quave v. Progress Marine*, 912 F.2d 798, 801, *on rehearing*, 918 F.2d 33 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2012 (1991) (same).[11]

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[11]Indeed, the Ninth Circuit implied a remedy in a different aspect of this very case. Although the Ninth Circuit purportedly relied on 33 U.S.C. § 927(b) to affirm the District Court's enforcement of the ALJ's sanction award, analysis of that section reveals that the Ninth Circuit in fact implied procedures not expressly stated in the LHWCA. 33 U.S.C. § 927(b) applies only when the Deputy Commissioner certifies facts to the district court demonstrating contempt of a proceeding before the Deputy Commissioner or Benefits Review Board.

4. The Ninth Circuit's Interpretation of the LHWCA Is Unprecedented and Unsupported.

The Ninth Circuit ignored the numerous cases implying remedies under the LHWCA and held that, by expressly allowing employers to recoup overpayments of compensation from future compensation payments, Congress expressed an intent to preclude any other form of recoupment. According to the Ninth Circuit, the employer's right to recoupment following a successful appeal does not represent a "gap" in the LHWCA which federal courts have power to fill, but instead is a matter which Congress expressly addressed. In reaching this conclusion, the Ninth Circuit noted three sections of the LHWCA providing for repayment of compensation out of future compensation benefits. The principal section[12] provides:

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[12]The Ninth Circuit also discusses 33 U.S.C. § 908(j), which applies when compensation, forfeited only as a result of a claimant's failure to report income, is deducted from future benefits due. That section is inapplicable, as it does not address the remedy when there is a final determination that past compensation paid was never properly due, which was the case here. Indeed, it presumes a claimant was both entitled to the past payments and will be entitled to continuing compensation because of an injury covered by the LHWCA. The Ninth Circuit also discusses 33 U.S.C. § 922, involving modification of an award by an ALJ because of a mistake of fact or change in conditions. The Ninth Circuit concedes that section is inapplicable, as the original award of compensation here was not modified, but was vacated by the Benefits Review Board. 33 U.S.C. §§ 908, 914 and 922 do not relate to the employer's appeal rights under 33 U.S.C. § 921.

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. § 914(j). The Ninth Circuit inferred from the provision of these remedies a congressional intent to preclude all other remedies.[13]

This Court has held that the provision of an express remedy under the LHWCA does not preclude other remedies unless there is a clear expression of congressional intent to limit other remedies. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 412-13 (1969). In *Burnside*, this Court rejected the contention that the remedy provided to employers against negligent third parties pursuant to 33 U.S.C. § 933(d) evidenced a congressional intent to preclude the employer's other remedies. As stated by this Court:

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[13]The fact that employers are permitted to obtain recoupment of overpayments of compensation from future compensation payments does not demonstrate a congressional intent to preclude other means of repayment. On the contrary, employers are given a right which no other creditor has, *i.e.*, the right to attach future payments of compensation. Except for the employer's claims for recoupment, compensation payments under the LHWCA are expressly made exempt from liens of all creditors, which include child support payments, IRS liens and civil judgments. 33 U.S.C. § 916. The fact that Congress afforded the employer remedies to recover overpayments in excess of those available to other creditors suggests a congressional intent to permit, not to preclude, recoupment.

> [T]he legislative grant of a new right [under the LHWCA] does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect.

394 U.S. at 412-13.

The LHWCA does contain a clear expression of congressional intent to preclude other remedies to employees, but not to employers. 33 U.S.C. § 905(a) states:

> *The liability of an employer* prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer *to the employee* . . . .

(Emphasis added.) There is no comparable provision precluding remedies of employers. Indeed, 33 U.S.C. § 914(j) states that the employer "shall be entitled to be reimbursed" out of future compensation benefits, not that such right to reimbursement out of future benefits is exclusive or in place of other liability of the employee to the employer. As the District Court stated:

> [T]here is nothing in the Act to indicate that [33 U.S.C. § 914(j)] was intended to be the employer's *exclusive* remedy for an overpayment of benefits.

Appendix B, at 19a (emphasis in original).

The federal courts have implied recoupment remedies in favor of employers when such remedies are not

expressly precluded by the LHWCA and would effectuate the policies of the Act. *See, e.g., The Etna,* 138 F.2d 37 (3rd Cir. 1943). In *The Etna,* the court recognized an equitable right to reimbursement of compensation payments from an injured worker who recovered damages from a third party. In that case, the worker contended, as does Mr. Eggert in this case, that the employer's request for recoupment should be denied because (1) the employer could only obtain reimbursement pursuant to the express methods established by the LHWCA, and (2) the District Court lacked jurisdiction to hear and determine the employer's claim. In rejecting these contentions, the United States Court of Appeals for the Third Circuit stated:

> [W]e think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized wholly apart from and without regard for the assignment provided for in Sec. 33(b) of the Act.

138 F.2d at 41. The holding in *The Etna* has been adopted by every court to consider the issue, and is so well established that "[n]o one, at this juncture, doubts the validity of this holding or its approval by Congress." *Bloomer v. Liberty Mut. Ins. Co.,* 445 U.S. 74, 90 (1980) (J. Blackmun, dissenting on other grounds).

The goal in construing federal statutes should be to give meaning to affirmative rights enacted by Congress and to effectuate congressional policy. In interpreting federal statutes, the courts should "presume the availability of all appropriate remedies unless Congress

has expressly indicated otherwise." *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 60 U.S.L.W. 4167, 4169 (1992). In denying the employer a right to recoupment following a successful appeal, the Ninth Circuit has rendered meaningless express rights established by Congress and, as discussed below, has undermined fundamental principles underlying the LHWCA.

5. The Ninth Circuit's Decision is Inconsistent with the Policies of the LHWCA.

Among the policies Congress expressed in the LHWCA is a strong policy to discourage fraud. Congress provided that a claimant who knowingly and willfully makes a false statement for purposes of obtaining benefits under the LHWCA shall be guilty of a felony, and upon conviction shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or both. 33 U.S.C. § 931(a).[14] Thus, a statutory construction that encourages and rewards fraud by allowing claimants who commit fraud the right to keep compensation wrongfully received is not consistent with congressional policy expressed in the LHWCA. As stated in Congress:

> Support for the Longshore Act, and support for those who, because of their disabilities, need compensation and medical

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[14]The provision of a criminal remedy does not suggest a congressional intent to preclude all other remedies. Such an intent should not be inferred "in the absence of clear language to that effect." *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 413 (1969). *See* discussion, part 3, *supra*.

> benefits should never be misinterpreted as sanctioning misrepresentation, fraud or abuse of the system.

130 Cong. Rec. H9730, H9732 (Sept. 18, 1984).

Another important policy of the LHWCA is to encourage prompt and voluntary payment of compensation to injured workers following their injuries. As one court stated, "[O]ne of the LHWCA's main purposes . . . is to ensure the prompt payment of benefits that may be necessary to a claimant's survival." *Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 1234 (5th Cir. 1989), *on rehearing*, 895 F.2d 1033 (1990).

The Ninth Circuit's holding that an employer cannot recoup overpayments would discourage prompt and voluntary payments, as it would place an employer who voluntarily pays compensation to an injured worker at risk of forfeiture if the claimant is ultimately found to have committed fraud or is otherwise not entitled to any compensation. The employer would be encouraged to controvert payments and pay the minimum compensation that may be required. The Ninth Circuit's construction of the LHWCA "would not only unjustly favor the less generous employer, but would also diminish the employee's chances for prompt financial assistance when he needs it most." *See McCabe Inspection Serv. v. Willard*, 240 F.2d 942 (2nd Cir. 1957).

Finally, the Ninth Circuit's construction of the LHWCA creates illogical and unjust results. Under the Ninth Circuit's construction, an injured worker, who by virtue of his or her injury is entitled to future compensation, would be required to repay an overpayment of

compensation in full. On the other hand, individuals who are wholly malingerers and have no disability whatsoever would be entitled to keep the money they have secured by their fraud. Such a construction makes no sense and could not have been intended by Congress.

B. The Existence of Federal Question Jurisdiction Over Claims Arising from Successful Appeals of Awards Under the LHWCA Is an Important Question of Federal Law.

The Ninth Circuit's reversal of the District Court was based on its finding that there is no federal subject matter jurisdiction. The Ninth Circuit's holding that subject matter jurisdiction is lost if the language of the federal statute does not provide express procedures for a remedy intended by Congress is a dramatic departure from decisions of this Court. *See, e.g., Franchise Tax Board v. Construction Laborers Vocation Trust,* 463 U.S. 1 (1983).

The complaint, on its face, stated a claim "arising under" the LHWCA: the implied right to recoup benefits paid under the Act when an award of benefits is vacated on appeal. *See* 28 U.S.C. § 1331. The issue turns on the determination of the meaning and application of the LHWCA. *See Franchise Tax Board,* 463 U.S at 9 (1983). The District Court and Ninth Circuit considered the express language of the LHWCA and other indications of legislative intent to resolve this issue, albeit reaching different conclusions.

The Ninth Circuit's reversal of the District Court was based on its finding that certain provisions in the

LHWCA regarding recoupment constitute the exclusive remedy intended by Congress. Although leaving the door open for remand of state law claims to a state court, the Ninth Circuit suggested that Congress expressed its intent to preempt claims for repayment of compensation wrongfully obtained. Ninth Circuit Opinion, Appendix A, 13a, at n.7.

The Ninth Circuit departs significantly from *Franchise Tax Board* in holding that a defense that is essentially a preemption defense defeats the federal question jurisdiction created by the plaintiff's affirmative pleadings. Instead, the Ninth Circuit should have considered the affirmative allegations in the complaint. As the District Court properly held, federal law creates Stevedoring's right to an effective appeal under the LHWCA. Therefore, the relief sought in this case "necessarily depends on resolution of a substantial question of federal law." *See Franchise Tax Board,* 463 U.S. at 28.

The Ninth Circuit's error in this case was anticipated by the following commentary:

> The problem lies in the possibility that in some cases a court will apply the first prong of *Franchise Tax Board* and find that plaintiff's claim requires the application of federal law, but then refuse jurisdiction because plaintiff does not have an express federal cause of action. In such a situation the court would have violated two jurisdictional precepts -- it would have decided a preemption defense in derogation of [*Louisville & Nashville R.R. v.*] *Mottley*[, 211 U.S. 149 (1908)] and it would have

> identified plaintiff's claim as one satisfying accepted arising-under standards, yet remanded that claim to the state court. [Footnotes omitted.]

Mary P. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts,* 54 Geo. Wash. L. Rev. 812, 852 (1986).

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the opinion of the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 6th day of April, 1992.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVEDORING SERVICES OF AMERICA, INC., formerly Seattle Stevedore Company, a California Corporation, *Plaintiff-Appellee,* v. EDWARD M. EGGERT; JODI EGGERT, his wife; and the marital community composed thereof, *Defendants-Appellants.*	No. 90-35015 D.C. No. CV-89-172-JLW OPINION

Appeal from the United States District Court
for the Western District of Washington
John L. Weinberg, Magistrate, Presiding

Submitted November 5, 1990*
Submission Deferred November 6, 1990
Resubmitted November 16, 1990
Seattle, Washington

Filed January 9, 1992

Before: Thomas Tang, Diarmuid F. O'Scannlain and Edward Leavy, Circuit Judges.

Opinion by Judge Tang

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

SUMMARY

Jurisdiction

Reversing and vacating a district court grant of summary judgment, the court of appeals held that the district court erroneously implied a federal cause of action under the LHWCA for recoupment of alleged overcompensation benefits paid to a claimant.

Appellant Edward M. Eggert was awarded disability pay under the LHWCA. However, the Benefits Review Board vacated the ALJ order and remanded for reconsideration of whether the employer was liable for Eggert's injuries and whether the injury was permanent. The ALJ then determined that the employer was partially liable, and this order was not appealed. In a subsequent order, the ALJ awarded attorneys' fees against Eggert as a sanction for having made proceedings to compel discovery necessary. The employer then filed an action to recover alleged overpayment of disability benefits paid to Eggert. The district court granted summary judgment for the employer and ordered repayment by Eggert. Eggert claimed the district court lacked subject matter jurisdiction.

[1] Because the employer's complaint was not an action to enforce compliance with a direct order of the ALJ, there was no jurisdiction under 33 U.S.C. § 927(b).

[2] Contrary to the judgment of the district court, the court of appeals also held that the LHWCA regulates the ability of employers to recoup alleged overcompensation from claimants. Because Congress has not been silent concerning the availability of an appropriate remedy under the LHWCA, the district court erred in holding that the Act did not preclude the employer's implied cause of action under the LHWCA for repayment of alleged overcompensation from the claimant. [3] Thus, because the employer's federal claims were without

merit, the district court lacked jurisdiction to entertain them. [4] In addition, pendent claim jurisdiction over the employer's state common law claims to recover overpayment of compensation was inappropriate in this case.

COUNSEL

Craig R. Elkins, Bellevue, Washington, for the defendants-appellants.

Richard Martin Slagle, Williams, Kasner & Gibbs, Seattle, Washington, for the plaintiff-appellee.

OPINION

TANG, Circuit Judge:

Edward M. Eggert ("Eggert") appeals the district court's order granting summary judgment in favor of Stevedoring Services of America, Inc. ("Stevedoring"). Eggert alleges that the district court lacked subject matter jurisdiction to decide this case. Specifically, Eggert contends that the district court erroneously implied a federal cause of action under the Longshore Harbor Workers' Compensation Act ("LHWCA" or "Act") for recoupment of alleged overcompensation paid to Eggert. We agree with Eggert that the district court lacked subject matter jurisdiction and therefore we reverse and vacate the judgment below.

Background Facts and Procedural History

Eggert was injured several times in 1978, 1979, and 1980. On January 26, 1980, he was injured while working for Stevedoring. On July 14, 1981, an administrative law judge ("ALJ") awarded Eggert disability pay under the LHWCA

pursuant to 33 U.S.C. § 919 (c), (d). The ALJ awarded Eggert $380.78 per week from December 6, 1980, through the date of the order. The order further provided for the continuation of payments to retrain Eggert.

Stevedoring appealed the 1981 order and moved for reconsideration. On July 12, 1985, the Benefits Review Board ("BRB") vacated the 1981 Order and remanded the case for reconsideration of whether Stevedoring was liable for Eggert's injury and whether the injury was permanent.

On remand, Stevedoring introduced additional evidence. The ALJ preliminarily noted that Eggert had concealed income that he had received at the same time he was receiving compensation benefits. The ALJ further noted that Eggert had misrepresented his medical condition to the doctors evaluating him, which affected their diagnosis of his condition. The ALJ, however, did conclude that Eggert's claim for benefits did have some legitimacy, stating that:

> Claimant has objective evidence of degenerative disk disease, and did suffer the injuries claimed. It is not unreasonable for him to have assumed that his inability to perform longshore work from January, 1980 through July, 1980, and again after December 6, 1980, was due, at least in part, to his various industrial accidents. . . . I decline to award [Stevedoring] costs under section 26 of the [LHWCA].

The ALJ then turned to the issues submitted to him on remand from the BRB. The ALJ ruled that two non-industrial accidents were separate and intervening causes of Eggert's disability. Consequently, on March 9, 1987, the ALJ ordered that Stevedoring was only liable to pay Eggert compensation for the period January 26, 1980, through April 15, 1980. The ALJ futher held that Stevedoring was entitled to a credit for all sums after April 15, 1980.

Neither Eggert nor Stevedoring appealed the 1987 order. In a subsequent order, the ALJ awarded Stevedoring an attorney's fee of $60 against Eggert as a sanction for having made proceedings to compel discovery necessary.

On February 23, 1989, Stevedoring filed a complaint in United States District Court for the Western District of Washington to recover alleged overpayment of disability benefits paid to Eggert. Because Stevedoring had continued to pay Eggert disability benefits up until the issuance of the March 1987 order, Stevedoring claimed that Eggert had been overpaid $96,651.55 in compensation. The parties brought cross-motions for summary judgment. The court granted Stevedoring's motion and ordered Eggert to reimburse Stevedoring $96,651.55, plus interest, for the excess payments. Eggert appeals.[1]

Standard of Review

The existence of subject matter jurisdiction is a question of law reviewed de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). The district court's factual findings on jurisdictional issues must be accepted unless clearly erroneous. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

[1]Although Eggert's notice of appeal was filed 33 days after the entry of the order granting summary judgment, Fed. R. App. P. 4(a)(2) treats this notice as having been timely filed immediately after the entry of final judgment, which was entered subsequent to Eggert's notice of appeal.

Discussion

I. SUBJECT MATTER JURISDICTION

A. Statutory Jurisdiction

Federal courts are courts of limited jurisdiction. "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West*, 873 F.2d at 1225. The district court ruled that it had federal question jurisdiction, 28 U.S.C. § 1331, because Stevedoring's action was fundamentally a suit to enforce an administrative order of the ALJ.

Under the LHWCA, federal district courts have jurisdiction to enforce certain ALJ orders. First, they have jurisdiction under 33 U.S.C. § 921(d), to enforce any order awarding workers' compensation.[2] Second, they have jurisdiction under 33 U.S.C. § 918(a) to enter judgment on an administrative supplementary order that declares an amount of default by an employer in a compensation award.[3] Both of these provisions

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[2]33 U.S.C. § 921(d) provides:

> If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred. . . . If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

[3]33 U.S.C. § 918(a) provides, in pertinent part:

> In case of default by the employer in the payment of compensation due under any award of compensation . . . [and upon application, investigation, notice, and hearing] the deputy commissioner shall make a supplementary order, declaring the

concern employers who are in default in payment of a compensation award and are thus inapplicable here.

Finally, pursuant to 33 U.S.C. § 927(b), the district courts may punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the Act.[4] Importantly, this provision relates to all persons in proceedings under the Act. A direct order of an ALJ to a claimant can be compelled by the district court using the means available for punishing contempt. In conjunction with these grants of jurisdiction, the Act also requires that proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided by 33 U.S.C. §§ 918 and 921. 33 U.S.C. § 921(e).

[1] The district court held that it had jurisdiction because it was enforcing the ALJ's administrative order. While there may have been jurisdiction pursuant to 33 U.S.C. § 927(b) if the ALJ had issued a direct order to Eggert to pay Stevedoring a sum certain, the March 1987 order did not do this. The order

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amount of the default . . . . The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court . . . . [T]he court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law.

[4]33 U.S.C. § 927(b) provides, in pertinent part:

If any person in proceedings before a deputy commissioner or Board disobeys or resists any lawful order or process, or misbehaves during a hearing . . . the deputy commissioner or Board shall certify the facts to the district court having jurisdiction in the place in which he is sitting . . . which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

merely provided Stevedoring a credit for payments previously made. It would be inconsistent to award the allowance of a credit and concurrently to give Stevedoring an award of reimbursement. Because Stevedoring's complaint was not an action to enforce compliance with a direct order of the ALJ, there is no jurisdiction under section 927(b). As there are no other statutory provisions under the LHWCA authorizing the district court's jurisdiction, *see* 33 U.S.C. § 921(e), we are as yet unable to find a basis for federal jurisdiction.

B. Implied Cause of Action Under the LHWCA

The district court also ruled that Stevedoring had an implied cause of action under the LHWCA. The district court reasoned that there was nothing in the Act which precluded Stevedoring from being reimbursed for an alleged overpayment of compensation benefits.

In *Sample v. Johnson*, 771 F.2d 1335, 1344-47 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986), we considered whether to imply a cause of action under the LHWCA in a different context.[5] Our reasoning in *Johnson* is instructive here. Quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), we reiterated that " '[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.' " *Johnson*, 771 F.2d at 1345-46. Thus, our preeminent inquiry is whether Congress has specifically enacted LHWCA provisions that regulate the ability of an employer to recover overpayments of compensation from claimants.

[2] Contrary to the judgment of the district court, we hold that the Act does regulate the ability of employers to recoup

[5]Specifically, the question at issue in *Johnson* was whether we should construe a private cause of action in favor of employees suing their employer for wrongful controversion of a workers' compensation claim. *See* 771 F.2d at 1337-38, 1346.

alleged overcompensation from claimants. Because Congress has not been silent concerning the availability of an appropriate remedy under the LHWCA, the district court erred in holding that the Act did not preclude Stevedoring's implied cause of action under the LHWCA for repayment of alleged overcompensation from the claimant.

The LHWCA contains three provisions dealing with payments in excess of what is later determined to have been due. First, "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. § 914(j). This section allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. *See Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 1234 (5th Cir. 1989), *reinstated in relevant part*, 895 F.2d 1033, 1036 (5th Cir. 1990) (en banc). Section 914(j) aims at reimbursing an employer for the amount of its *advance* payments, where these payments were too generous, for however long this takes, out of *unpaid* compensation found to be due. *Tibbetts v. Bath Iron Works Corp.*, 10 Ben. Rev. Bd. Serv. (MB) 245, 249 (1979), *cited in Phillips*, 877 F.2d at 1234. However, section 914(j) also shows a congressional recognition that there might not be "any" unpaid installment to recover. Ultimately, this section does not provide an employer with a right of repayment for alleged overpayment of compensation. *See Henry v. Gentry Plumbing & Heating Co.*, 704 F.2d 863, 865 (5th Cir. 1983) (stating that it was the intent of Congress that "an injured worker receive regular compensation, even that [is] later determined to have been wrongly exacted and [is] not recoverable by the payer, [rather] than that he be left without assistance until all amounts are finally determined"); *Cf. Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679-80 (5th Cir. 1969) (holding that, where employer had erroneously paid benefits to seaman under the LHWCA, but was liable to the seaman under the Jones Act, 46 U.S.C. app. § 688, employer would not be entitled to repayment of the compen-

sation benefits but would be entitled to a credit against those items of damages ultimately allowed which bore a reasonable relationship to items of loss compensated by the LHWCA), *cert. denied*, 396 U.S. 1037 (1970).

Second, section 922 provides for review of a compensation order by an ALJ and authorizes issuance of a new order "which may terminate, continue, reinstate, increase, or decrease [the] compensation" previously ordered, "on the ground of a change in conditions or because of a mistake in a determination of fact" in the original award. 33 U.S.C. § 922. The statute then states that:

> Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined ....

Id. Although the facts of our case do not involve a modification hearing before the ALJ,[6] we consider section 922 to see if it limits the ability of an employer to recover overpayments of compensation pursuant to a compensation order under the

[6]Although Eggert had previously been awarded compensation under a 1981 ALJ order, the March 1987 ALJ order did not modify the earlier order, and therefore the 1987 order was not made pursuant to section 922. Instead, the BRB vacated the 1981 ALJ order and remanded the case to the ALJ for further findings. Furthermore, although the 1987 ALJ order cut off Stevedoring's disability compensation liability to Eggert earlier than the 1981 ALJ order, the ground of decision was not a mistake in fact, but the ruling that non-industrial injuries occurring after the industrial injury were separate and intervening causes of Eggert's disability.

LHWCA. We conclude that section 922 does limit employer remedies. The provision clearly states that any new order issued "*shall not* affect any compensation previously paid . . . and any payment made prior thereto in excess of [a] decreased rate shall be *deducted from any unpaid compensation* . . . ." *Id.* (emphasis added). The modification provision does not provide for recovery of alleged overpayments by means of repayment by the employee but only provides the employer with a credit against prospective disability compensation payments. *Bethlehem Shipbuilding Corp. v. Cardillo*, 102 F.2d 299, 302 (1st Cir.) ("In other words the [employer] in no case receives back any compensation previously paid but may have prior excess payments credited or allowed upon a present award, future awards, or any prior unpaid award . . . ."), *cert. denied*, 307 U.S. 645 (1939).

Finally, a third provision dealing with this issue is section 908(j), which provides:

> (1) The employer may inform a disabled employee of his obligation to report to the employer . . . any earnings from employment or self-employment . . .
>
> (2) An employee who —
>
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
>
> (B) knowingly and willfully omits or understates any part of such earnings,
>
> and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.
>
> (3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any

> amount and on such schedule as determined by the deputy commissioner.

33 U.S.C. § 908(j). The statutory scheme in section 908(j) for recovery of overpayments clearly does not authorize an action against the claimant for repayment; it contemplates only a suspension of prospective compensation benefits. Plainly, the statute envisions an employee's underreporting of income, exactly the situation the ALJ found in this case. The remedy provided is *not* a federal cause of action for repayment but deduction from prospective compensation payments. *See Freiwillig v. Triple A South*, 23 Ben. Rev. Brd. Serv. (MB) 371, 374-75 (1990) (stating that the penalty for willful concealment of post-injury earnings is suspension of benefits pursuant to § 908(j), and that a claimant, pursuant to 33 U.S.C. § 931, may be found guilty of a felony for knowingly and willfully making a false statement for the purpose of obtaining a benefit under the Act).

[3] In conclusion, taken together, these three provisions convince us that Congress did not intend to permit an employer a federal cause of action against a claimant for repayment of alleged overpayments of compensation. Although Congress did not expressly preclude an employer action for repayment, its intent on this issue is understood by the express provisions we have examined. We will not rewrite or engraft new remedies upon the provisions Congress has affirmatively and specifically enacted. The district court erred in holding that Stevedoring had an implied remedy under the LHWCA. Because Stevedoring's federal claims for recoupment are without merit, the district court lacked jurisdiction to entertain them.

C. Pendent Jurisdiction

The ALJ, on May 19, 1987, ordered Eggert to pay Stevedoring $60 for abuse of the discovery procedures during the administrative proceedings. We agree with the Director,

Office of Workers' Compensation Programs, as amicus, that the federal district court had jurisdiction to compel Eggert's compliance with the ALJ order. *See* 33 U.S.C. § 927(b). With this basis for federal jurisdiction, Stevedoring claims that the district court should exercise pendent jurisdiction over the state common law claims set forth in the complaint. These claims represent additional efforts to recover overpayments of compensation.

[4] Pendent claims must derive from a nucleus of operative fact held in common with claims for which there is an independent basis for federal jurisdiction, and they must be such that they ordinarily would be expected to be tried in a single proceeding with the federal claims. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1091 (9th Cir. 1989). The claims at issue here, however, are independent of one another. Stevedoring's claim for enforcement of the May 19, 1987 attorney's fee order is quite distinct from Stevedoring's claim for recovery of alleged overpayments of disability compensation under state common law. Indeed, the state law claims substantially predominate over the narrow claim over which the district court has jurisdiction.[7] *Cf. United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966). Consequently, pendent claim jurisdiction is not appropriate in this case.

Conclusion

The district court erred in concluding that it had subject matter jurisdiction over Stevedoring's claim for repayment from Eggert of alleged overcompensation of disability bene-

[7]Whether there can be a state common law claim for recovery of alleged overpayments of disability compensation under the LHWCA is an open question in Washington, the state from which Eggert hails. (for *see Todd Pac. Shipyards Corp. v. Gibson*, 763 P.2d 206, 207 (Wash. Ct. App. 1988)). Although the question is not before us, it appears likely that Congress has expressed its intent to preempt state common law claims by employers against claimants for *repayment* of alleged overpayments of disability compensation.

fits. However, the district court did have jurisdiction to enforce the May 19, 1987 ALJ order requiring Eggert to pay Stevedoring $60 in attorney's fees. We reject this limited grant of jurisdiction as a basis on which the district court may retain jurisdiction over the pendent state common law claims included in Stevedoring's complaint. Because these state common law claims are not retained, they must be dismissed, without prejudice, from Stevedoring's complaint.

Consequently, we vacate the judgment ordered in favor of Stevedoring. We remand this case to the district court for further proceedings, consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEDORING SERVICES OF AMERICA, INC.,	)	CASE NO. C89-172W
Plaintiff,	)	ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF
v.	)	
EDWARD EGGERT, et al.,	)	
Defendants.	)	

INTRODUCTION AND SUMMARY

The parties have submitted cross-motions for summary judgment. For the reasons set forth below, the court finds there are no genuine issues of material fact; and that plaintiff is entitled to summary judgment as a matter of law.

FACTUAL HISTORY

Based upon the affidavits and briefs, the court finds there is no genuine issue as to the following facts.

Defendant Edward M. Eggert suffered an injury in 1980 while employed as a longshoreman by plaintiff

Stevedoring Services of America, Inc. ("Stevedore") (formerly Seattle Stevedore Company). After a hearing, an Administrative Law Judge awarded him benefits under the Longshore and Harbor Workers Compensation Act ("the Act"), 33 U.S.C. §§ 901 et seq. Stevedore appealed the determination, but continued to pay benefits, as the law requires, while the case wound its way through the administrative appeal process. In July of 1985 the Benefits Review Board reversed the determination and remanded for a new hearing. Based upon the evidence at the final hearing, held in July of 1986, the ALJ found that Eggert had fraudulently obtained his benefits. He found Eggert had lied repeatedly about whether he was receiving income other than his benefits, making false statements under oath both on written forms and in his testimony at various hearings. By order of March 9, 1987, the ALJ held that Eggert was entitled to benefits only for a period of less than three months during 1980. The ALJ also awarded Stevedore $60.00 in attorneys fees arising from a discovery dispute. The 1987 orders by the ALJ were not appealed, and are now final.

CONTENTIONS OF THE PARTIES

Because Stevedore continued to pay Eggert benefits from 1980 until the final decision in 1987, it claims it has substantially overpaid him. The precise amount of the overpayment is discussed below. Stevedore seeks an award of the overpayment, plus interest, plus the $60 award of attorneys fees. Eggert concedes that the final determination by the ALJ was that Eggert was not entitled to some of the compensation he received. He asserts, however, that this court has no jurisdiction to order him to reimburse Stevedore. He asserts that all

issues as to payment of benefits must be decided administratively under the Act.

JURISDICTION OF THIS COURT

This court has federal question jurisdiction, pursuant to 28 U.S.C. §1331. Extended administrative proceedings under the Act culminated in a final order adjudicating the rights of the parties. That order determined Eggert was entitled to benefits for only a limited period. Because Stevedore had paid Eggert much more, the ALJ ruled that "credit is to be given for all sums paid to date." While the ALJ did not specify dollar amounts, Eggert has not challenged Stevedore's allegations as to the amount of overpayment of compensation benefits. This action is fundamentally one to enforce the administrative order, thus according federal question jurisdiction to this court.

Eggert argues that the doctrine of "primary jurisdiction" divests this court of any jurisdiction. He places particular reliance upon Todd Pacific Shipyards v. Gibson, 52 Wn. App. 653 (1988). But the Supreme Court held, in United States v. Western Pacific Railroad Co., 352 U.S. 59, at 63-64 (1956), that the doctrine of primary jurisdiction,

> . . . comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views . . . ."

Todd Pacific Shipyards v. Gibson was such a case. There, the ALJ had ruled that the claimant had reached maximum medical improvement three years prior to the decision. But the ALJ had not determined whether there had been an overpayment of benefits. The Court of Appeals of Washington held that this issue was best resolved by the administrative decision-maker with specialized expert knowledge; and that if there was any right to collect an overpayment in court, it was only after an administrative determination of whether there in fact had been an overpayment. 52 Wn. App. at 656-657.

By contrast, in this case, there is a final administrative determination that there has been an overpayment; and there is no dispute as to the amount. All that remains is enforcement of Stevedore's right to receive it. This does not require the expertise of the administrative structure created by the Act.

Eggert also presents the closely-related argument that Stevedore cannot proceed here because it has not exhausted its administrative remedies. While he summarily asserts that Stevedore "failed to seek adjudication of the recoupment issue" before the ALJ, he has cited no provision of the Act, or other authority, indicating there were further administrative remedies available which Stevedore could have utilized.

Eggert further argues that the Act does not contemplate the entry of orders requiring injured worker to reimburse their employers for any overpayments of benefits. He cites 33 U.S.C. §914(j), which provides:

> (j) Reimbursement for advance payments. If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

Eggert contends an employer can therefore be reimbursed only to the extent of such credits against future installments due. But this argument is not persuasive for a number of reasons. §914(j) refers to "advance payments" of compensation; and the payments Stevedore seeks recover here were not "advance payments." Secondly, there is nothing in the Act to indicate that this was intended to be the employer's exclusive remedy for an overpayment of benefits. But finally, and most fundamentally, Eggert's construction of the statute would be unconscionably unfair to employers. This facts of this case establish that about as well as a case could. Stevedore was required to continue to make payments while its appeal was pending. The appeal was ultimately successful, and determined that Eggert was not entitled to the vast majority of the benefits he had already received. Nor was he entitled to any future benefits. If Eggert's construction of the Act were correct, Stevedore would be required to look to non-existent future payments to recoup approximately $100,000 in overpayments. Such a construction would emasculate Stevedore's appeal rights, and provide Eggert an unconscionable windfall. This could not have been he intent of the drafters of §914(j).

In summary, the court finds it has federal question jurisdiction over Stevedore's claims; and that such jurisdiction is not defeated by the provisions of the Act

or by the doctrines of primary jurisdiction or exhaustion of remedies.

These rulings are consistent with those made by this court in Travelers Insurance Co. v. Thompson, case no. C85-2439W. That case involved similar facts and many of the same issues.

AMOUNT OF OVERPAYMENT

The record is conflicting in one respect as to the amount of the overpayment claimed by Stevedore.

In paragraph 15 of the complaint, Stevedore asserts that Eggert received $101,003.32 in compensation to which he was not entitled; and an additional $5,461.41 in medical benefits to which he was not entitled. The total claim in the complaint, without interest, attorneys fees and costs, was therefore $106,464.73.

The affidavit of Dan Stone in support of Stevedore's motion for summary judgment, however, makes clear that these were the total amounts paid by Stevedore. He continues:

> 5. Based on Judge Burch's final order, there has been an overpayment of disability compensation to Mr. Eggert in the amount of $96,651.55.
>
> 6. In addition to compensation as stated above, [Stevedore] paid $5,461.41 for medical benefits on behalf of Edward M. Eggert. Of this sum, $2,598.70 was paid for medical services rendered after April 15, 1980.

Affidavit of Dan Stone, at 2-3. The date of April 15, 1980 was the date the ALJ fixed for the termination of Stevedore's responsibility for paying compensation to Eggert.

In Stevedore's original brief in support of its motion for summary judgment, however, it sought recovery of the overpayment of compensation ($96,651.55), plus interest, and the attorneys fees award; but did not mention any claim for overpayments of medical benefits. Plaintiff's Brief at p. 7-8. Later, in responding to Eggert's cross-motion, counsel for Stevedore again requested, "Judgment should be entered against plaintiff in this case in the amount of $96,651.55 plus interest . . . ." Plaintiff's Response, p. 12.

Because Stevedore asserted that Eggert had raised an exhaustion issue for the first time in his reply brief, the court authorized a final set of reply briefs. In that brief Stevedore did address the exhaustion issue. But it also, without comment, increased its requested relief to include, ". . . $2,598.70 of medical payments for which [Stevedore] was not responsible pursuant to the Decision and Order on Remand." Plaintiff's Reply at p. 5. Stevedore also submitted a proposed order, now setting the overpayment at $99,250.25, exclusive of interest, attorneys fees and costs.

The record is sufficient to support a finding that the overpayment was $96,651.55. It does not support an award for the additional $2,598.70, however. On these cross-motions for summary judgment, the court can only award those damages as to which there is no genuine issue of fact. Stevedore's original motion papers limit the overpayment claim to $96,651.55. Eggert did not

dispute that amount in any way, and it is supported by the ALJ's order. But Eggert was not afforded a fair opportunity to contest the additional claim for $2,598.70. Although the affidavit of Stone referred to this amount, Stevedore's motion did not seek recovery for it until the final reply brief.

Furthermore, the record does not conclusively show that Stevedore is legally entitled to reimbursement for any portion of the medical benefits paid. The ALJ's order makes no explicit determination as to the period of medical benefits for which Stevedore is responsible. It may well be that its responsibility to pay medical benefits coincides in time with its responsibility to pay compensation. But the ALJ did not adjudicate that issue; and because it was not part of Stevedore's motion, the parties have not briefed it. In sum, this court cannot find as a matter of law that Stevedore is entitled to recover any portion of the medical benefits it paid.

STEVEDORE'S ATTORNEYS FEES

Stevedore is entitled to recover its reasonable attorneys fees in this case, pursuant to 33 U.S.C. §926.

When the 1987 orders of the ALJ became final, there was never any legitimate basis for Eggert to refuse to return the overpayments to Stevedore. This litigation should not have been necessary. Once brought, its continuation was without reasonable ground.

Stevedore has not requested any specific amount in fees, or presented any documentation of the time expended by its attorneys. A procedure for doing so is set forth below.

RULINGS

Eggert's motion for summary judgment and for Rule 11 sanctions is therefore denied; and Stevedore's motion for summary judgment is granted in part and denied in part, as follows:

The court finds that Stevedore is entitled to summary judgment in the sum of the following amounts:

(1) all compensation payments it made to Eggert or on his behalf after April 15, 1980, in the total amount of $96,651.55;

(2) the attorneys fee award of $60.00, which was payable May 19, 1987;

(3) interest on the foregoing amounts at the same rates provided for judgments of this court, pursuant to 28 U.S.C. §1961 (interest on overpayments of compensation shall run from the date of each payment by Stevedore); and

(4) Stevedore's reasonable attorneys fees for proceedings in this court.

Counsel shall confer and agree, as fully as possible, as to the foregoing amounts and, if possible, shall present an agreed form of judgment. In the absence of agreement, Stevedore shall submit a proposed form of judgment, with an explanatory memo, and (if necessary) sworn documentation in support of its claim for attorneys fees, and shall note the matter as a motion. Eggert shall respond by presenting its proposed form of judg-

ment, memo and any other responsive materials.

Upon entry of judgment, Stevedore shall also be entitled to statutory costs, as taxed by the Clerk.

DATED this 24th day of October, 1989.

/s/_____
John L. Weinberg
United States Magistrate

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEDORING SERVICES OF AMERICA, INC.	)	NO. C 89-172W
Plaintiff,	)	JUDGMENT ON ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF
vs.	)	
EDWARD EGGERT and JODI EGGERT, husband and wife,	)	
Defendants.	)	

THIS MATTER came on regularly before the United States Magistrate, John L. Weinberg, on each parties' Cross-Motions for Summary Judgment. The Magistrate's Order Granting Summary Judgment in favor of Stevedoring Services of America, Inc. was entered on October 24, 1989 and is incorporated herein by reference. Based upon that Order, and upon defendants' failure to oppose entry of this proposed order, judgment is hereby entered against Edward Eggert and Jodi Eggert, husband wife and in favor of Stevedoring Services of American, Inc. as follows:

1. All compensation payments made by Stevedoring Services of America, Inc. to Eggert, or on his

behalf, after April 15, 1980 in the total amount of:

$96,651.55

2. Interest on the foregoing amounts pursuant to 28 USC Section 1961 in the amount of:

$50,794.13

3. Stevedoring Services of America, Inc.'s reasonable attorney's fees in the amount of:

$ 7,142.00

4. Stevedoring Services of America, Inc.'s reasonable costs in the amount of:

$ 162.00

5. The attorney's fee award of May 19, 1987 in favor of Stevedoring Services of America, Inc. in the amount of:

$ 60.00

DONE IN OPEN COURT this 5 day of January, 1990.

/s/
JOHN L. WEINBERG,
UNITED STATES MAGISTRATE

JUDGMENT SUMMARY

Judgment Creditor: Stevedoring Services of America, Inc.

Judgment Debtors: Edward Eggert and Jodi Eggert

Principal Judgment Amount:
$154,809.68

Interest to date of Judgment: Included in principal judgment amount.

Principal judgment shall bear interest at: 8.19%

Attorney for Judgment Creditors:
Richard M. Slagle
Williams, Kastner & Gibbs

Attorney for Judgment Debtor:
James R. Walsh

PRESENTED BY:

WILLIAMS, KASTNER & GIBBS

By:_____
Richard M. Slagle
Attorneys for Stevedoring Services of America, Inc.

COPY RECEIVED, APPROVED AS TO FORM:

By:_____
James R. Walsh
Attorney for Edward Eggert & Jodi Eggert

APPENDIX D

U.S. Department of Labor

In the Matter of EDWARD M. EGGERT, Claimant v. SEATTLE STEVEDORING COMPANY and JONES-WASHINGTON STEVEDORING COMPANY, Employers	CASE NOS. 81-LHC-997 81-LHC-998 81-LHC-999 81-LHC-1000 OWCP NOS. 14-39509 14-45034 14-51248 14-58183

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Seattle, WA 98101
For Jones-Washington Stevedoring Company

Before: EDWARD C. BURCH
Administrative Law Judge

DECISION AND ORDER ON REMAND

Statement of the Case

Claimant Edward Eggert sustained five industrial injuries to his lower back, four while he was employed by Jones-Washington Stevedoring Company (in April 1978, July 1978, May 1979, and September, 1979), and the fifth, on January 26, 1980, while he was employed by Seattle Stevedoring Company. Claimant also sustained two non-industrial accidents; one on March 30, 1980, when he fell asleep at the wheel of his truck and hit a tree, and another on July 6, 1980, when he fell from the back of a pickup truck.

In my Decision and Order dated July 14, 1981, I awarded claimant temporary total disability benefits commencing as of December 6, 1980, and continuing until claimant finished his vocational rehabilitation. In that decision, I found that claimant's disability was due not just to one incident, but to many traumas, including the two non-industrial injuries. However, I also found that claimant would not have become disabled but for his industrial injuries, the last of which occurred on January 26, 1980. Hence, I assessed liability against Seattle Stevedore, as claimant's employer when his last

industrial injury occurred.

Seattle Stevedore appealed this decision. The Benefits Review Board, in a decision dated July 12, 1985, remanded this case for further findings, stating that:

1. If the work-related injuries suffered by claimant while an employee of Jones-Washington causes calculable permanent disability, then Jones-Washington can be found liable for a portion of the benefits.

2. If an aggravation of claimant's prior work-related injuries occurred in January, 1980, then Seattle Stevedore may be held liable for claimant's disability at that time.

3. Seattle Stevedore is liable for claimant's entire disability only if the subsequent non work-related injuries caused no disability or were the natural and unavoidable result of the work-related injuries.

4. Any disability caused by the subsequent, non work-related injuries must be factored out (of Seattle Stevedore's total liability).

5. It was error not to determine whether claimant's disability was permanent. The nature of claimant's disability must be determined based on the medical evidence without reference to vocational rehabilitation training.

While this matter was on appeal, claimant completed his rehabilitation training, and a second hearing, before Judge Halpern, was held to determine the extent

of his permanent disability. At that hearing, the parties stipulated that claimant had a wage earning capacity of $5.00 per hour (1983 Hearing Transcript, p. 58).

A third hearing, following the Board's decision to remand, was held before me on December 9, 1985. At that time, I determined that claimant became permanently totally disabled as of December 6, 1980. I also instructed the parties to submit further evidence so that a determination could be made as to:

1. Whether liability for claimant's disability should be apportioned between Jones-Washington and Seattle Stevedore;

2. Whether claimant's non-industrial accidents were separate and intervening causes of his disability;

3. Whether Special Fund relief is appropriate;

4. Whether or not claimant's total permanent disability has ceased; and

5. If so, when and how much residual disability does claimant have.

A fourth hearing was held on July 14 and 15, 1986, with receipt of further evidence.

Findings of Fact and Conclusions of Law

I find it necessary to discuss claimant's testimony before addressing the issues outlined above. At the July, 1986 hearing, it became apparent that claimant has absolutely no credibility. For example, although claim-

ant had indicated at the original hearing that in December, 1980 he had had no income and was living on food stamps, during that same month he deposited over $8,000 in his bank account (86 Hearing Transcript, pp. 112-113). Although at the 1983 hearing claimant had testified that he had not done any contracting for 3-1/2 years, in March of 1983 he was doing a contracting job for his attorney (at that time) for $28,500 (86 Transcript, pp. 116-119). Claimant admitted to having lied on the witness stand before Judge Halpern (86 Hearing Transcript, p. 121).121). In September of 1982, claimant obtained a $2,500 student loan, although his vocational training was paid for in full by Seattle Stevedoring (86 Hearing Transcript p. 115). When his compensation carrier refused to authorize treatment at the Pain Control Center, claimant obtained coverage for this treatment through his non-occupational medical insurance carrier by lying on the claim form, stating that this treatment was not due to an accident and was not work-related (86 Hearing Transcript, pp. 150-151). In applying for Social Security Disability benefits, in October, 1985, claimant stated that he had had no earnings since 1983, though in fact he had performed several contracting jobs in 1984 (86 Hearing Transcript pp. 143-145). Also in October, 1985, when claimant was seen by Dr. Hollingsworth for the treatment of obesity, he indicated to Dr. Hollingsworth that he had no back ailments and that he received plenty of exercise as a farmer (86 Transcript, pp. 146-147). Claimant stated on the witness stand that he had lied to Dr. Hollingsworth in order to get speed (86 Transcript, p. 147). There are numerous other examples of claimant's lack of veracity within the July, 1986 Hearing Transcript.

Unfortunately, claimant's lack of credibility impacts on most of the medical evidence in this case, since the doctors who examined him relied heavily on his subjective complaints in making their diagnoses. Nevertheless, I will make an attempt to resolve the issues outlined by the Board in its decision of July 12, 1985.

1. Apportionment of liability between Jones-Washington and Seattle Stevedoring:

Claimant first saw J.W. Ebert, M.D., a general practitioner, for his back problems. Dr. Ebert began treating claimant for lower back complaints in July of 1978 (S-3, p. 4). At that time, claimant reported that he had injured his back at work twice, once while pulling on chains in April of 1978, and once when he slipped on some grease on July 16, 1978 (S-3 pp. 4-5). Claimant also apparently gave Dr. Ebert a history of a prior back strain in 1965 (S-3, pp. 4-5). Dr. Ebert stated that claimant's x-rays showed that he had degenerative joint disease of the low back, but there was no evidence of trauma (S-3, p. 5). Dr. Ebert prescribed anti-inflammatory medications and continued to see claimant regularly until October 23, 1978 (S-3, p. 7). By that time claimant had returned to work, but was still complaining of pain, so Dr. Ebert referred him to Dr. Corrigan, a specialist in orthopedic surgery (S-3, p. 7; C-1, p. 4).

The next time Dr. Ebert saw claimant was immediately following his industrial injury in May of 1979 (S-3, p. 8). At that time claimant was complaining that he had pain in his left chest and that his low back problems had been aggravated (S-3, p. 8). Dr. Ebert's examination revealed no change in claimant's back condition (S-

3, p. 8). In June of 1979 claimant told Dr. Ebert that he was seeing a chiropractor (S-3, p. 9). Dr. Ebert did not see claimant again until after his injury on January 26, 1980 (while employed by Seattle Stevedoring) (S-3, p. 10). Claimant did not tell Dr. Ebert what symptoms he had been experiencing prior to the January, 1980 accident, and never reported the work-related injury which occurred in September of 1979, while he was employed by Jones-Washington (S-3, p. 10). This is a significant omission, since claimant testified at the 1986 hearing that the September, 1979 accident was his worst injury (86 Transcript, p. 81). When claimant first reported to Dr. Ebert following the January, 1980 accident, he only complained of a right rib cage injury; he did not report any back pain until February of 1980 (S-3, p. 11). On April 7, 1980, Dr. Ebert wrote a letter to the Office of Workers' Compensation programs indicating that, in his opinion, claimant's condition had returned to the level at which it had been before his January, 1980 injury (S-6, p. 15). However, on April 1, 1980, Dr. Ebert saw claimant in connection with his March 30, 1980 non-industrial injury, in which he fell asleep at the wheel of his truck and hit a tree (S-3, p. 14). At that time, claimant was complaining of pain in his right rib cage and an increase in his low back pain (S-3, p. 15). On April 17, 1980, Dr. Ebert once again referred claimant to Dr. Corrigan (S-3, p. 15). In May of 1980 claimant informed Ebert that Dr. Corrigan wanted to put him in a body cast (S-3 p. 16). Dr. Ebert next saw claimant following his second non-industrial accident, on July 6, 1980, when claimant fell from the back of a pickup truck (S-3, p. 16). In that accident, claimant had injured his left shoulder, had a laceration on the left side of his head, and had sustained a concussion (S-3, p. 16). He did not, however, complain of back pain (S-3, p. 24). The next time Dr. Ebert

heard from claimant was on December 5, 1980, when claimant called to tell him that he was trying to work but needed pain medication (S-3, p. 17). Based on claimant's statements, Dr. Ebert concluded that he could no longer perform longshore work as of December 5, 1980 (S-3, P. 23). Dr. Ebert attributed claimant's disability to the January, 1980 accident (S-3, p. 21). However, he also stated that no one incident was more responsible than others for claimant's disability, and that it was the series of injuries that finally culminated in claimant's inability to work (S-3, pp. 23-25). He also stated that claimant had returned to pre-injury status as of March 28, 1980 (that is, before the first of claimant's two non-industrial accidents), and that the March, 1980 truck accident had aggravated claimant's condition (S-3, pp. 13-14 & 24-25).

Dr. Corrigan first saw claimant on November 10, 1978, on recommendation from Dr. Ebert (C-l, p. 6). At that time, claimant reported a history of pinched nerves in 1961 or 1962, and the strain to his low back in April of 1978 (C-1, p. 7). Dr. Corrigan diagnosed (1) degenerative arthritis of the lumbar spine and (2) strain injury of the lumbar spine (C-1, pp. 10-11). He attributed these diagnoses to claimant's repetitive industrial injuries, but also stated that claimant's arthritic changes pre-existed the April, 1978 accident (C-1, pp. 11 & 38-39). Dr. Corrigan next saw claimant on April 29, 1980 (C-1, p. 12). At that time claimant told him of the September, 1979 accident, the January, 1980 accident, and the March, 1980 non-industrial accident (C-1, pp. 12-13). Dr. Corrigan's office notes did not reflect any history of claimant's May, 1979 industrial accident (C-1, p. 36). Claimant told Dr. Corrigan that the March, 1980 accident had aggravated his January, 1980 rib injury, but

had not affected his back (C-1, p. 13). Claimant complained of pain to his upper left leg and buttocks. X-rays showed no significant change (C-1, pp. 13-14). Dr. Corrigan found that the auto accident in March, 1980 was not a major factor, and attributed claimant's symptoms to his industrial injuries, stating that it would be almost impossible for him to separate them (C-1, p. 17). He also stated that he could not separate claimant's arthritic problems from his traumatic injuries (C-1, p. 44). However, he did find that the January, 1980 accident was a separate, aggravating factor in claimant's condition (C-1, p. 42).

Dr. Corrigan placed claimant in a body cast for five weeks beginning May 7, 1980 (C-1, p. 20), and released him to return to work on July 15, 1980 (C-1, p. 32). The last time he saw claimant for treatment was October, 1980, at which time he recommended that claimant seek retraining (C-1, pp. 24-25). Although his office notes reflect that he was made aware of claimant's second non-industrial accident, the fall from the pickup in July, 1980, his disability evaluation was made prior to this accident (C-1, pp. 17-18).

Dr. Corrigan also referred claimant to a physical therapist, Brad Jordan, who gave claimant body mechanics education, heat, massage, and general exercise beginning on June 13, 1980 (S-4, p. 3). This referral was to help claimant move again after the time he spent immobilized (in the body cast) (S-4, p. 7). In contrast to Dr. Corrigan's testimony, Jordan stated that claimant was basically asymptomatic until his fall from the pickup truck (at 35 miles per hour) on July 6, 1980 (S-4, pp. 5-6). Jordan stated that this accident was a significant trauma, and would be expected to cause lower back

pain (S-4, p. 6). However, the only industrial accident of which Jordan was aware was the one in January, 1980 (S-4, pp. 8-9).

Claimant was also examined by Paul Ruuska, M.D., a specialist in orthopedic surgery, on March 16, 1981, apparently at the request of Seattle Stevedore, in connection with the January, 1980 injury (S-7, p. 100). Claimant told Dr. Ruuska about his previous industrial injuries in July, 1978 and May and September of 1979, as well as his truck accident in March, 1980 (S-7, p. 101). Claimant also told Dr. Ruuska that his most severe accident was the one in September of 1979, and that the truck accident had not influenced his low back condition (S-7, pp. 103-104). Based on this information and examination, Dr. Ruuska concluded that the January, 1980 injury caused a temporary aggravation to claimant's pre-existing back problems, but that claimant's condition reverted to pre-injury status as of mid-April, 1980 (S-7, p. 104). Dr. Ruuska also was aware of claimant's July, 1980 truck accident (though apparently claimant did not tell him of it), and felt that it could be one of the major causes of claimant's symptoms (S-7, p. 104). Although Dr. Ruuska found that claimant suffered a definite impairment of his lumbar spine, he stated that "very little or none of this is due to the injury of January 26, 1980" (S-7, p. 104).

Claimant was also examined, at the request of Seattle Stevedore, by orthopedic specialist John Burns, M.D., on November 26, 1985 (S-7, p. 150). In contrast to the history given to some of his other physicians, claimant told Dr. Burns that he had suffered contusions to his sternum and ribs, and a twisting injury to his back in the March, 1980 auto accident, and that the July,

1980 fall from the pickup truck had also resulted in some low back symptoms (S-7, p. 151). In Dr. Burns' opinion claimant should have reached maximum medical improvement within 3 months of each of his accidents (S-7, p. 152). While Dr. Burns did find that claimant had a continuing disability, and limited him to lifting no more than 40 pounds, he attributed claimant's continuing problems to his degenerative disc disease rather than to any of his traumatic episodes (S-7, p. 152).

The only other doctor who specifically addressed the question of how much each of claimant's injuries contributed to his disability was Sanford Wright, M.D., a neurosurgeon, who testified by deposition on December 12, 1985. Claimant was referred to Dr. Wright by Dr. Ebert in October of 1985. Claimant did not tell Dr. Wright about his 2 non-industrial accidents (S-21, pp. 4 & 15). Dr. Wright thought that the January, 1980 accident was the main cause of claimant's problems, but he also stated that in making his diagnosis, he relied, at least in part, on claimant's report of his symptoms (S-21, pp. 34 & 30). Dr. Wright also stated, however, that the March, 1980 accident probably contributed to claimant's symptoms (S-21, pp. 32-33). When claimant saw Dr. Wright, he was complaining of neck pain as well as low back pain (S-21, p. 9). According to Dr. Wright, a myelogram performed on October 23, 1985 revealed that claimant has a probable cervical disc herniation at C6-C7 (S-21, p. 12). Although the results of the myelogram show more abnormality at claimant's neck than at his lumbar spine, Dr. Wright stated that the degree of pain does not always match the most abnormal area on film (S-21, p. 17).

It is difficult to assess the accuracy of any of the medical opinions of record, due to claimant's lack of veracity, and the physicians' reliance on his subjective complaints in forming their diagnoses. For example, a surveillance film taken of claimant in July of 1981 shows him packing lumber and kicking drums of building material without difficulty (S-22). This film demonstrates that claimant was capable of heavy labor at that time, and it therefore negates Dr. Burns' opinion that claimant still suffered some residual disability in 1985. Furthermore, claimant's omission of certain significant events in describing his health history to his doctors, such as his industrial accident of September, 1979 (Dr. Ebert), or his two non-industrial accidents (Dr. Wright), further complicates matters. The evidence does show, however, that claimant was working without restrictions as a longshoreman prior to his industrial accident in January of 1980, and that while his x-rays show evidence of degenerative disk disease, they do not show evidence of a traumatic injury. In view of this evidence, I find that claimant suffered no permanent partial disability from the industrial accidents he sustained while an employee of Jones-Washington. Jones-Washington is therefore not liable for any portion of claimant's disability following his January, 1980 injury.

As the Board has stated, and as existing case law holds, where a work-related injury aggravates a pre-existing condition, all of the resulting disability is compensable, and the employer at the time of the aggravating injury is liable for all disability due to pre-existing injuries. (Benefits Review Board's decision of July 12, 1985, p. 3 and cases cited therein). I find that although claimant had fully recovered from his prior accidents, the January, 1980 accident aggravated his pre-

existing degenerative disc disease. Thus, Seattle Stevedore is liable for the total extent of claimant's disability following this aggravating injury.

Although claimant alleged, at the July 1986 hearing, that he was suffering from neck pain which arose from the injury of September, 1979, while he was employed with Jones-Washington (86 Transcript, pp. 7, 159-163), I do not credit this testimony, for the following reasons: (1) Claimant alleged that he complained of neck pain in the emergency room following the September, 1979 accident, yet the emergency room records show only that he complained of right elbow and shoulder pain (86 Transcript, pp. 164-166); (2) Claimant was seeing a chiropractor for neck adjustments as far back as 1976 (86 Transcript pp. 172-174); (3) When questioned, claimant stated he could not remember if he had neck problems before September, 1979 (86 Transcript, p. 172); (4) Claimant never made a claim for a neck injury; and (5) In all of the hearings and depositions in which claimant has testified, he never alleged a neck injury before the July, 1986 hearing.

2. Whether Claimant's Non-Industrial Accidents Were a Separate and Intervening Cause of his Disability:

Based on Dr. Ebert's testimony that claimant had reached pre-injury status as of March 28, 1980, Dr. Burns' opinion that claimant's residual problems were due to his degenerative disc disease rather than any traumatic episode, and Dr. Ruuska's opinion that claimant had reverted to pre-injury status as of mid-April, 1980, that none of his residual symptoms were due to the January, 1980 accident, I find that claimant's residual

back problems after April 15, 1980 were due to aggravations of his degenerative disc disease by the incidents which occurred in March and July, 1980.[1] Thus, these two non-industrial accidents were separate and intervening causes of claimant's disability, and thus Seattle Stevedoring is only liable for claimant's temporary total disability from January 26, 1980 through April 15, 1980.

3. Special Fund Relief:

Since claimant sustained no permanent disability as a result of the January, 1980 accident, Special Fund relief is not appropriate.

4. Sanctions under FRCP 37:

Seattle Stevedore, in its post-hearing brief, has requested attorney fees under FRCP 37, as incorporated by 20 C.F.R. §702.341. As grounds for this request, Seattle Stevedore cites claimant's refusal to submit to a medical examination until compelled to do so, his alleged failure to produce documents until their existence was revealed by other witnesses, his failure to answer interrogatories until compelled to do so, and his

---

[1] Claimant testified that he aggravated his back in October and December of 1980 while employed by Jones-Washington (86 Transcript, pp. 94-95). These incidents, if they occurred, may also have contributed to his back condition. However, claimant never reported either of these injuries to Jones-Washington, and apparently never filed a claim for them either (86 Transcript, pp. 184-188); thus, any claims made for these injuries now would be time barred under Sections 12 and 13 of the Act.

failure to adequately answer discovery requests, resulting in two continuances (Seattle Stevedore, post hearing brief, p. 38).

Seattle Stevedore's submitted 3 motions to compel discovery in this case, one of which, dated January 31, 1986, was granted on March 3, 1986.

Rule 37(a)(4) provides that:

> if the motion [to compel] is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Claimant did not submit an opposition to the motion to compel of January 31, 1986. Nor do there appear to be other circumstances which would make an award of expenses unjust. Seattle Stevedore has not submitted an itemization of its attorney fees in connection with this motion. Hence, I hereby grant Seattle Stevedore 10 days from the date this decision and order becomes final to submit an itemization of such fees. I also grant claimant an additional 10 days from the date Seattle Stevedore's fee petition is filed with this office to object to said petition.

5. Costs under Section 26:

Both Seattle Stevedore and Jones Washington have requested that costs be awarded to them under section 26 of the Act. Section 26 provides that if "a claim or order has been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings."

As Seattle Stevedore has pointed out, there are numerous instances of claimant's misrepresentation in the record. For example, the surveillance films taken in July 1981 and May 1986 show claimant performing heavy physical labor without difficulty, at the same time that claimant was alleging he continues to be totally disabled from longshore work (S-22 & S-23). Claimant also failed to disclose his income (in excess of $80,000) from his contracting business to the Department of Labor, when requested to do so in 1985 (S-8, pp. 55-56; 86 Transcript, pp. 57-58).

As stated above, claimant also admitted that he lied to Judge Halpern at his 1983 hearing when he stated that he had not performed contracting work for 3-1/2 years prior to that hearing (86 Transcript, pp. 116-119).

While it is true that claimant has grossly exaggerated his symptoms, and has lied on the witness stand regarding his contracting business, there is some legitimacy to his claim for benefits. Claimant has objective evidence of degenerative disk disease, and did suffer the injuries claimed. It is not unreasonable for him to have assumed that his inability to perform longshore work

from January, 1980 through July, 1980, and again after December 6, 1980, was due, at least in part, to his various industrial accidents. Since at least a portion of this claim is valid, and it would be difficult, if not impossible, for respondents to segregate those expenses which relate to the legitimate portion of this claim, I decline to award costs under section 26 of the Act.

ORDER

1. Seattle Stevedore is ordered to pay claimant temporary total disability benefits in the amount of $380.78 per week (2/3 of his stipulated average weekly wage of $571.17) from January 26, 1980 through April 15, 1980.

2. Credit is to be given for all sums paid to date.

3. Special fund relief is denied.

4. Jones-Washington Stevedoring Company is not liable for any portion of claimant's temporary total disability from January 26, 1980 through April 15, 1980.

5. Neither Seattle Stevedore nor Jones-Washington is liable for claimant's residual disability after April 15, 1980.

6. Seattle Stevedoring is ordered to submit, within 10 days of the date on which this decision and order becomes final, a fee petition for attorney fees incurred in preparing its motion to compel discovery dated January 31, 1986.

7. Claimant has 10 days from the date Seattle Stevedoring's fee petition is submitted to object to those fees.

8. Relief under section 26 of the Act is denied.

/s/
EDWARD C. BURCH
Administrative Law Judge

Dated: MAR 9 1987
San Francisco, California

APPENDIX E

Selected Provisions of Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*

This appendix includes the following provisions: 33 U.S.C. §§ 905(a); 908(j); 914; 916; 921; 922; 927; and 931.

§ 905. **Exclusiveness of liability**

(a) **Employer liability; failure of employer to secure payment of compensation**

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For

purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. § 905(a) (as amended Sept. 28, 1984).

* * *

§ 908. **Compensation for disability**

(j)(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who --

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings,

and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to

the employee in any amount and on such schedule as determined by the deputy commissioner.

33 U.S.C. § 908(j) (as amended Sept. 28, 1984).

* * *

§ 914. **Payment of compensation**

(a) Manner of payment

Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) Period of installment payments

The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Notification of commencement or suspension of payment

Upon making the first payment, and upon suspension of payment for any cause, the

employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) Right to compensation controverted

If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) Additional compensation for overdue installment payments payable without award

If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) Additional compensation for overdue installment payments payable under terms of award

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

(g) Notice of payment; penalty

Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) Investigations, examinations, and hearings for controverted, stopped, or suspended payments

The deputy commissioner (1) may upon

his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

(i) Deposit by employer

Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.

(j) Reimbursement for advance payments

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(k) Receipt for payment

An injured employee, or in case of death

his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

33 U.S.C. § 914 (as amended Sept. 28, 1984).

* * *

§ 916. **Assignment and exemption from claims of creditors**

No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

33 U.S.C. § 916 (as adopted March 4, 1927).

* * *

§ 921. **Review of compensation orders**

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided

in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record

considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary

members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of

the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether

rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

33 U.S.C. § 921 (as amended Sept. 28, 1984).

* * *

§ 922. **Modification of awards**

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation

rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

33 U.S.C. § 922 (as amended Sept. 28, 1984).

* * *

§ 927. **Powers of deputy commissioners or Board**

(**a**) The deputy commissioner or Board shall have power to preserve and enforce order during any such proceedings; to issue subpoenas for, to administer oaths to, and to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, or the taking of depositions before any designated individual competent to administer oaths; to examine witnesses; and to do all things conformable to law which may be necessary to enable him effiectively to discharge the duties of his office.

(**b**) If any person in proceedings before a deputy commissioner or Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear

after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner or Board shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

33 U.S.C. § 927 (as amended Oct. 27, 1972).

* * *

§ 931. **Penalty for misrepresentation -- prosecution of claims**

(a) Felony; fine; imprisonment

(1) Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this chapter shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

(2) The United States attorney for the district in which the injury is alleged to have occurred shall make every reasonable effort to promptly investigate each complaint made under this subsection.

(b) List of persons disqualified from representing claimants

(1) No representation fee of a claimant's representative shall be approved by the deputy commissioner, an administrative law judge, the Board, or a court pursuant to section 928 of this title, if the claimant's representative is on the list of individuals who are disqualified from representing claimants under this chapter maintained by the Secretary pursuant to paragraph (2) of this subsection.

(2)(A) The Secretary shall annually prepare a list of those individuals in each compensation district who have represented claimants for a fee in cases under this chapter and who are not authorized to represent claimants. The names of individuals contained on the list required under this subparagraph shall be made available to employees and employers in each compensation district through posting and in such other forms as the Secretary may prescribe.

(B) Individuals shall be included on the list of those not authorized to represent claimants under this chapter if the Secretary determines under this section, in accordance with the procedure provided in subsection (j) of section 907 of

this title, that such individual --

(i) has been convicted (without regard to pending appeal) of any crime in connection with the representation of a claimant under this chapter or any workers' compensation statute;

(ii) has engaged in fraud in connection with the presentation of a claim under this or any workers' compensation statute, including, but not limited to, knowingly making false representations, concealing or attempting to conceal material facts with respect to a claim, or soliciting or otherwise procuring false testimony;

(iii) has been prohibited from representing claimants before any other workers' compensation agency for reasons of professional misconduct which are similar in nature to those which would be grounds for disqualification under this paragraph; or

(iv) has accepted fees for representing claimants under this chapter which were not approved, or which were in excess of the amount approved pursuant to section 928 of this title.

(C) Notwithstanding subparagraph (B), no individual who is on the list required to be maintained by the Secretary pursuant to this section shall be prohibited from presenting his or her

own claim or from representing without fee, a claimant who is a spouse, mother, father, sister, brother, or child of such individual.

(**D**) A determination under subparagraph (A) shall remain in effect for a period of not less than three years and until the Secretary finds and gives notice to the public that there is reasonable assurance that the basis for the determination will not reoccur.

(**3**) No employee shall be liable to pay a representation fee to any representative whose fee has been disallowed by reason of the operation of this paragraph.

(**4**) The Secretary shall issue such rules and regulations as are necessary to carry out this section.

(c) False statements or representation to reduce, deny, or terminate benefits

A person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents pursuant to section 909 of this title if the injury results in death, shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

33 U.S.C. § 931 (as amended Sept. 28, 1984).

(2)

No. 91-1626

Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEVEDORING SERVICES OF AMERICA, INC.,
formerly Seattle Stevedore Company,
a California Corporation,

Petitioner,

vs.

EDWARD M. EGGERT; JODI EGGERT, his wife;
and the marital community composed thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC. IN SUPPORT OF PETITIONER

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Rick T. Haselton
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Petitioner,

vs.

EDWARD M. EGGERT; JODI EGGERT, his wife;
and the marital community composed thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Master Contracting Stevedore Association of the Pacific Coast, Inc., is a trade association of 21 member firms, including petitioner, Stevedoring Services of America, engaged in providing contract stevedoring services in all the principal ports of California, Oregon, Washington, Alaska, and Hawaii.[1] The member firms provide substantially all of the

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[1] MCSA's members include the following:

Bellingham Stevedoring Co.
California Stevedore and Ballast
California United Terminals
Container Stevedoring Co., Inc.
Cooper Stevedoring Co., Inc.
Hawaii Stevedores
International Transportation Service, Inc.
Jones Washington Stevedoring Company
Jones Oregon Stevedoring Company
Maersk Pacific, Inc.
Marine Terminals Corporation
Marine Terminals Corporation (of LA)
Matson Terminals, Inc.
McCabe, Hamilton & Renny Company, Ltd.
Metropolitan Stevedoring Co.
Northern Stevedore & Handling Corporation
Pasha Maritime Services, Inc.
Stevedoring Services of America, Inc.
Trans Pacific Container Corp.
Westfall Stevedoring Company
Yusen Terminals, Ltd.

stevedoring and marine terminal services performed by private contractors for ocean-going vessels calling at ports in those states. MCSA Members employ a work force of approximately 10,000 longshoremen and clerks, all of whom are members of the International Longshoreman's and Warehousemen's Union.

MCSA members have a vital financial interest in the subject matter of this petition. Each year they and their insurance carriers pay millions of dollars in longshore benefits pursuant to awards that are procured through fraud or misrepresentation or pursuant to awards that are subsequently either vacated or substantially reduced on appeal.

To the extent employers and insurers cannot recoup these compensation payments through offsets against future payment obligations, claimants are unjustly (and sometimes fraudulently) enriched. This, in turn, increases the liability and insurance costs of MCSA members. Recoupment, as sought by petitioner SSA

and enforced by the district court, will prevent such unjust enrichment and reduce employers' liability.

SUMMARY OF ARGUMENT

This case raises issues of overriding national importance: The Ninth Circuit's holding substantially abrogates employers' rights of appeal under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and effectively moots thousands of pending LHWCA appeals. That holding,[2] unless reversed, will substantially increase the cost of doing business in every port, and along every navigable waterway, in the United States.

Under the Ninth Circuit's holding, an employer's exclusive recoupment remedy

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[2] The Fifth Circuit, applying an analysis similar to the Ninth Circuit's, very recently reached the same result. See Ceres Gulf v. Cooper, No. 91-2097, 1992 U.S. App. LEXIS 5571 (March 27, 1992).

under the LHWCA is through offsets against inchoate future payment obligations; where there is no future obligation, there is no recoupment. Thus, even if an employer ultimately succeeds in reversing or vacating a compensation award, there can be no recoupment where that award has been fully paid during the pendency of the appeal.

This analysis ignores three "working realities" of longshore litigation: (1) Stays pending appeal under the LHWCA are practically impossible to obtain. (2) Consequently, employers must continue to pay benefits pursuant to adverse awards even as they appeal those awards. (3) Because of administrative and judicial backlog, compensation is often fully paid before an appeal is concluded.

Thus, if the Ninth Circuit is correct, an employer's statutory right of appeal (33 U.S.C. § 921) is often meaningless. Reversal, even upon a determination that a claimant fraudulently secured benefits, yields no substantive

relief. Appeals in such cases can result in nothing more than advisory opinions.

The Ninth Circuit's view of the LHWCA and associated remedies produces two additional important and inequitable results:

(1) Any recovery of longshore benefits from unjustly enriched claimants is limited to cases in which claimants have a continuing (if reduced) future entitlement to benefits. Thus, only those claimants who are so severely disabled that they are entitled to ongoing benefits are required to disgorge overpayments--while those who have received full compensation (and often have returned to work) by the time the overpayment is adjudicated escape any repayment obligation.

(2) Claimants who have engaged in misconduct in obtaining benefits are entitled to retain those monies--so long as there is no ongoing, future payment obligation against which an offset can be made. Thus, no matter how egregious a

claimant's misconduct, if he or she has been completely (albeit wrongfully) compensated, the employer has no remedy. This is a license for fraud.

Nothing in the LHWCA's language, legislative history, or underlying policies requires these anomalous results.

STATEMENT OF THE CASE

Respondent Edward Eggert obtained an award of longshore compensation benefits from his employer, Stevedoring Services of America ("SSA"). In obtaining this award, Mr. Eggert lied and made various misrepresentations.

SSA subsequently appealed the administrative law judge's compensation award to the Benefits Review Board. However, under existing law, SSA could not obtain a stay of payment of compensation pending the administrative appeal. The Benefits Review Board ultimately vacated the administrative law judge's

compensation order and remanded for a new hearing.

Upon remand, the administrative law judge determined that Mr. Eggert had, in fact, engaged in a pattern of lies and misrepresentations. Consequently, while Mr. Eggert had received $101,003.32 in total compensation payments, the administrative law judge concluded that Mr. Eggert was, in fact, entitled only to temporary disability benefits in the amount of $4,351.77.

SSA subsequently filed suit against Mr. Eggert in the United States District Court for the Western District of Washington, seeking to recoup the amount of compensation ($96,651.55), which Mr. Eggert had wrongfully obtained. SSA invoked an implied right of reimbursement under the LHWCA and further asserted pendant state claims for unjust enrichment, conversion, and fraud.

Upon cross-motions for partial summary judgment, the district court entered judgment for SSA, holding:

(1) the district court had federal question jurisdiction under 28 U.S.C. § 1331 because the gravamen of the action was one to enforce an administrative order under the LHWCA; and (2) under the circumstances of this case, where Eggert would otherwise reap "an unconscionable windfall," the LHWCA permitted an implied right of recoupment.

The Ninth Circuit reversed, holding that the district court lacked federal subject matter jurisdiction. The court of appeals concluded: (1) the LHWCA's express provision for recoupment through offsets against future compensation payments (33 U.S.C. § 914(j)) is exclusive; (2) the LHWCA does not permit an implied right of recoupment except as expressly provided in § 914(j); and (3) consequently, the district court lacked "federal question" jurisdiction to adjudicate SSA's claims. See 953 F.2d at 555-57.

In addition, in dictum, the court of appeals seriously questioned the

availability of recoupment remedies under state law. See 953 F.2d at 558, n.7 ("Although the question is not before us, it appears likely that Congress has expressed its intent to preempt state common law claims by employers against claimants for repayment of alleged overpayments of disability compensation.") (original emphasis).

REASONS FOR GRANTING WRIT

A. The Ninth Circuit's Holding Substantially Abrogates Employers' Rights of Appeal Under the LHWCA.

Each year, MCSA member employers pay millions of dollars of benefits pursuant to awards of compensation for scheduled disabilities under the LHWCA, 33 U.S.C. § 908(c)(1)-(20).[3]

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[3] Cf. Annual Report on Administration of The Act During Fiscal Year 1990 (U.S. Dept. of Labor 1991) at 23 (noting that maritime employers and their insurance carriers paid a total of $417,697,000 in

While member employers appeal many of these awards, benefits must be paid immediately (see 33 U.S.C. § 914(f)) and without any realistic possibility of a stay of payment pending appeal. See 33 U.S.C. § 921(b)(3) (prohibiting stays of payment of longshore compensation pending appeal "unless irreparable injury would otherwise ensue to the employer or carrier").[4]

Because of the peculiar "lump sum" aspect of scheduled compensation awards, such awards are almost invariably fully paid within three or four years. See 33 U.S.C. § 908(c)(1)-(20). Conversely,

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LHWCA benefits in 1989).

[4] Accord Edwards v. Director, OWCP, 932 F.2d 1325, 1329 (9th Cir. 1991); Rivere v. Offshore Painting Contractors, 872 F.2d 1187, 1191 (5th Cir. 1989) ("Irreparable injury is demonstrated only when the compensation award may be too heavy for the employer or insurer to pay without practically taking all his property or rendering him incapable of carrying on his business. . . .").

because of administrative and judicial backlog, employers' appeals, including judicial review by the courts of appeals, are rarely concluded in less than four years.

The arithmetic is obvious: Scheduled awards are almost always fully paid before appeals from such awards are finally adjudicated.

If the Ninth Circuit is correct, these appeals are pointless. Even if an employer ultimately prevails upon appeal, the employer has no remedy. Moneys paid out pursuant to improper awards cannot be recovered.

In the Ninth Circuit's view, thousands of pending LHWCA appeals are (or will soon be) non-justiciable.

This result cannot be squared with an employer's statutory right of appeal under the LHWCA. See 33 U.S.C. § 921. Nor can it be squared with fundamental due process. By barring post-appeal recoupment, the Ninth Circuit has effectively sanctioned administrative

takings (through LHWCA compensation awards) without meaningful judicial review.

The Ninth Circuit's holding has profound implications for pending and future LHWCA appeals. Review should be allowed.

B. **The Ninth Circuit's Holding, Which Permits Claimants to Retain Wrongfully/Fraudulently Obtained Benefits, Is Contrary to the LHWCA's Remedial Purposes.**

These are hard times on the waterfront. Because the future is uncertain and temptation is great, fraud in obtaining longshore compensation is pervasive and proliferating.

MCSA member stevedores live with this reality every day. And they pay for it--in spiraling workers' compensation premiums and self-insurance costs.

The Ninth Circuit's holding greatly exacerbates this problem: Because of that holding, dishonest employees now know they can "take the money and run." Even if

their fraud is ultimately discovered, their employers have no recourse.

This result, which inevitably flows from the Ninth Circuit's "exclusive" construction of LHWCA section 914(j), cannot be reconciled with the Longshore Act's fundamental equitable and remedial policies. The LHWCA is intended to promote fair compensation of injured workers--not to permit claimants, including those who have engaged in fraud, to retain benefits to which they are not entitled.

This Court should accept review to enforce the LHWCA's integrity by reversing this egregious result.

CONCLUSION

For the foregoing reasons, petitioner Master Contracting Stevedore Association of the Pacific Coast, Inc. supports petitioner's prayer that a writ of certiorari issue to review the decision

of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 4th day of May, 1992.

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(3)

No. 91-1626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEVEDORING SERVICES OF AMERICA, INC.,
formerly Seattle Stevedore Company,
a California Corporation,
Petitioner,

v.

EDWARD M. EGGERT; JODI EGGERT, his wife; and
the marital community composed thereof,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF STEVEDORES, SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., ALLIANCE OF AMERICAN INSURERS, SHIPBUILDERS COUNCIL OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER, STEVEDORING SERVICES OF AMERICA, INC.

Pursuant to Rule 26 and Rule 37 of the Rules of the Supreme Court of the United States, the National Association of Stevedores, Shipbuilders Council of America, Inc., the Alliance of American Insurers, and Signal Mutual Indemnity Association, Ltd. move for leave to file the brief *amici curiae* in support of Petitioner, Stevedoring Services of America, Inc.

The National Association of Stevedores (NAS) is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade

association organized under the laws of the District of Columbia whose 38 member companies are stevedore contractor/marine terminal operators doing business on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members every NAS member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Shipbuilders' Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, shiprepairers, and component manufactures located in all sections of the country. Collectively, the member companies constitute about 95 percent of the Nation's shipbuilding industrial mobilization base. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance, employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

Amici collectively are the vast majority of self-insured and insured employers subject to the LHWCA and insurance carriers or facilities which secure the compensation for such employers. All *amici* are concerned with on the job injuries sustained by employees engaged in maritime employments subject to the LHWCA, the proper administration of the Act, and the prevention of fraud and abuse within the system.

Accordingly, *amici* respectively move for leave to file the attached brief *amici curiae* in support of respondents.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an employer compelled to pay benefits under the Longshore and Harbor Workers' Compensation Act is entitled to repayment of overpayments if it is successful on appeal.

2. Whether a claimant who obtains compensation benefits under the Longshore and Harbor Workers' Compensation Act through misrepresentation or fraud is entitled to keep payments wrongfully received.

3. Whether a claim for repayment of compensation wrongly paid under the Longshore and Harbor Workers' Compensation Act "arises under" that Act, so that federal subject matter jurisdiction exists.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* in this matter is detailed in the accompanying motion for leave to file this brief in support of petitioners and in the interest of reducing burdens on this Court will not be restated and are incorporated herein.

SUMMARY OF ARGUMENT

Contrary to the decision of the court below, Congress *did* intend that employers subject to the federal Longshore and Harbor Workers' Compensation Act (the LHWCA) 33 U.S.C. § 901 *et seq.* do have a federal right of action to recover payments made because of fraud or material misrepresentation. Employers have express statutory rights which arise from the LHWCA itself, Title 18 of the U.S. Code, and federal common law.

ARGUMENT

I. THE PROCEEDINGS BELOW

Amici respectfully urge this Court to grant the petition for writ of certiorari filed by petitioner, Stevedoring Services of America, Inc., for all of the reasons presented in the petition and for the additional reasons submitted by *Amici.*

The questions presented for review as stated by the petitioner are (1) Whether an employer compelled to pay benefits under the Longshore and Harbor Workers' Compensation Act is entitled to repayment of overpayments if it is successful on appeal, (2) Whether a claimant who obtains benefits under the Longshore and Harbor Workers' Compensation Act through misrepresentation or fraud is entitled to keep payments wrongfully received, and (3) Whether a claim for repayment of compensation wrongly paid under the Longshore and Harbor Workers' Compensation Act "arises under" that Act, so that federal subject matter jurisdiction exists.

The Court below, after reviewing §§ 908(j), 914(j) and 922 of the Act (33 U.S.C. § 908(j), 914(j) and 922) answered the third question in the negative, reversed the district court and declined to answer the first two questions. In doing so, the court below noted section 931 without discussion, and stated: (Pet. Brief, page 12(a)

> "In conclusion, taken together, these three provisions convince us that Congress did not intend to permit an employer a federal cause of action against a claimant for repayment of alleged overpayments of compensation. Although Congress did not expressly preclude an employer action for repayment, its intent on this issue is understood by the express provisions we have examined. The district court erred in holding that Stevedoring had an implied remedy under the LHWCA."

Amici submit that the court below was wrong, as was the Court of Appeals for the Fifth Circuit in its March 27, 1992 decision in *Ceres Gulf, Inc. v. Cooper*, No. 91-2097, —— F.2d —— (5th Cir. 1992) and that the issues presented must be reviewed and resolved by the Court.

II. THE EXTENT OF THE PROBLEM

Nationally, workers' compensation costs total more than $60 billion per year and are rising rapidly, according to an estimate by Tillinghast. One reason for increasing costs is that the system is rife with fraud, including systemic fraud in many areas of the country. Fraud is such a severe problem that the insurance industry has set up an anti-fraud division within the National Council on Compensation Insurance (Workers' Compensation Report, Bureau of National Affairs, 12/25/90, 11/25/91). There is no reason to believe that fraud is any less prevalent under the Longshore and Harbor Workers' Compensation Act than under the various state acts.

LHWCA costs, while a relatively small portion of this total, represent a very large percentage of the payroll of employers subject to the Act, even exceeding 50% in some ports. According to data compiled by the U.S. Department of Labor,[1] the total cost of operating the

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[1] Longshore and Harbor Workers' Compensation Act, Annual Report on Administration of the Act during Fiscal year 1989, submitted to Congress 1990, U.S. Department of Labor.

LHWCA program during 1989 exceeded $521 million. Of this amount, employers paid out over $417 million in direct disability compensation and medical benefit payments to claimants, and were assessed some $89 million more to cover obligations under § 8(f) of the Act.

This Court's answer to petitioner's questions are of great concern to at least 365 insurance carriers and their insureds and the 380 self-insured employers authorized by the Secretary to secure compensation under the Act. *Amici* are amongst those entities, and so too are some federal or federally related entities because of the Non-Appropriated Fund Instrumentalities Act of 1952, 5 U.S.C. §§ 8171-8173, which provides that the LHWA applies to civilian employees of such entities.

III. THE STATUTORY REMEDIES

Congress has enacted two workers' compensation laws; the LHWCA and the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.* Most other federal civilian employees must look to FECA for compensation for workplace injuries or deaths. FECA expressly authorizes federal agencies to deduct overpayments of compensation made because of an error of fact or law from "later payments to which the individual is entitled". (5 U.S.C. § 8129). In this respect FECA and the LHWCA are similar on the subject of reducing or terminating compensation of claimants still receiving payment at the time the determination is made that they are not or are no longer entitled to such payments.

The court below indicates that with respect to the LHWCA Congress only intended to permit carriers and self-insureds to have relief from a continuing fraud, but not from one that has been fulfilled (no future employer payments). *Amici* seriously doubt that the Congress had any such intention, but looking solely at the three sections of the LHWCA and the one section of FECA, one might find reason to accept that analysis. Until recently, how-

ever, that analysis was not tested by any employer under either statute.

But in 1982 Congress provided another statutory remedy for both the federal FECA employer and the LHWCA employers and their insurance carriers. It enacted the Victim and Witness Protection Act and provided statutory financial relief for victims of federal crime—court ordered restitution. (18 U.S.C. § 3663, formerly 3579). The federal employer, being also the federal prosecutor, quickly made use of the expressed route of recovery with respect to FECA fraud. [*U.S. v. DeRosa*, 783 F.2d 1401 (9th Cir. 1986), *cert. den.*, 447 U.S. 908, *U.S. v. Seay*, 718 F.2d 1279 (4th Cir. 1983), *cert. den.*, 467 U.S. 1226], Semiannual Report, Office of Inspector General, U.S. Department of Labor, October 1, 1988-March 31, 1989, pages 21, 22). The express federal route to redress is relatively straight. It is 18 U.S.C. § 1001 (fraudulent statements to an agency of the government with respect to a matter under agency jurisdiction) plus §§ 1341 or 1342 of Title 18 (using the mail to make such statements), and then the Victim and Witness Protection Act, which at 18 U.S.C. § 3663 (formerly 3579) provides for an order of restitution upon conviction of a violation of any section of Title 18.

The same route was made available by Congress for private LHWCA employers. Section 31 of the LHWCA expressly makes fraudulent statements or misrepresentations with respect to claims under the Act a federal crime. Such statements also violate 18 U.S.C. § 1001 because they are also fraudulent statements made to a federal agency with respect to a matter subject to its jurisdiction. In addition, use of the federal mail in transmitting such statements is a violation of 18 U.S.C. § 1341 or § 1342 and upon conviction the trail leads inexorably to the Victim and Witness Protection and Act and the opportunity for the employer-victim to obtain an order of restitution; i.e. total recovery of all wrongfully paid compensation.

IV. THE COMMON LAW REMEDY

Amici submit that the propriety and amount of LHWCA compensation and the recovery of overpayments or undeserved compensation are federal questions arising from federal law. *Amici* also submit that federal law expressly and impliedly contemplates the recovery of all payments caused or induced by fraud—fraud against the employer and fraud against the federal government.

The sections of the LHWCA cited by the court below specifically take care of the situation in which compensation is still being paid voluntarily or pursuant to an issued compensation order as required by the Act. Title 18 of the U.S. Code and § 931 of the LHWCA take care of the situation in which compensation is no longer being paid and there has been a criminal conviction. In the only remaining situation, no compensation being paid and no criminal conviction, the defrauded employer must have a federal common law right of recovery or the system fails, and the employer's obligation to secure compensation for legitimate claimants is adversely affected, *Bloomer v. Liberty Mutual Insurance Co.*, 455 U.S. 74 (1980).

Amici submit that Congress did not intend to leave the redress of an employer victimized by fraud or material misrepresentation made in connection with either federal workers' compensation law, FECA or LHWCA, depend solely upon the actions of the U.S. Attorney. Neither did Congress intend to leave employers without any civil remedy when the statutory review process of the LHWCA outdistances the schedule of compensation payments. In this case there is a federal wrong and it must be addressed under federal law in a federal court. The axiom, state and federal, that a party should not be allowed to profit from his own misdeeds or wrongs is so imbedded in our jurisprudence that a legislature need not specifically enact it into law. As to workers' compensation fraud Congress has expressed itself on every situation that

needed specific mention and left to federal common law the obvious redress for simple fraud and the recovery of monies paid under false pretenses or material representations.

CONCLUSION

The petition for writ of *certiorari* should be granted by this Court. The extent of the problem addressed by this case, at first blush, appears to be minor but actually extends to all employers and employees subject to the workers' compensation laws enacted by the Congress, LHWCA and FECA. The court below failed to review all of the pertinent provisions of law, and the questions presented can only be answered by this Court. We urge the Court to grant the petition and resolve the issue.

Respectfully submitted,

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